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A TREATISE

ON THE

LAW AND PRACTICE

OF

INJUNCTIONS.

BY

WILLIAM WILLIAMSON KERR,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

FIFTH EDITION.

BY

JOHN MELVIN PATERSON, M.A., LL.M.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW

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PREFACE.

ELEVEN years have elapsed since the publication of the Fourth Edition of this work, and during this period a large number of cases have been decided and Acts passed which have affected statements in the text, necessitating considerable alterations and additions to the present Edition, the te[illegible] of which has been increased to the extent of over 90 pages. Th[illegible] Index has also been enlarged, and references have been given to contemporary reports (including the Revised Reports up to volume 126), which, it is hoped, will add to the usefulness of the work. All material decisions which have been reported to date will be found in the text, or in the Addenda on page lviii.

J. M. PATERSON.

9, OLD SQUARE,
LINCOLN'S INN,
21*st February*, 1914.

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ADDENDA ET CORRIGENDA.

Page 8 (*i*). *Add* "*Re Republic of Bolivia Exploration Syndicate*, (1914) 1 Ch. 139."

Page 9 (*p*). *Add* "And see *Dover Picture Palace Co.* v. *Dover Corporation*, (1913) 11 L. G. R. p. 977, *per* Hamilton, L.J."

Page 10 (*x*). *Add* "And see *Robinson* v. *Fenner*, (1913) 3 K. B. 835; (1914) 83 L. J. K. B. 81."

Page 10 (*y*). *Add* "*Garvin, Gibson & Co.* v. *Gibson*, (1913) 3 K. B. pp. 387, 388; 82 L. J. K. B. 1315, 1318."

Page 18 (*n*). *Add* "*Dayers-Smith* v. *Hadsley*, (1913) 108 L. T. 897; 57 S. J. 555; *Bedford* v. *Leeds Corporation*, (1913) 77 J. P. 430."

Page 32 (*e*). *After* "*Slazenger* v. *Spalding*" (p. 33), *add* "*Att.-Gen.* v. *Parish*, (1913) 2 Ch. p. 454; 82 L. J. Ch. p. 567."

Page 34 (*i*). *Add* "*Bedford* v. *Leeds Corporation*, (1913) 77 J. P. 430, 434."

Page 34 (*p*). *Add* "But see *Att.-Gen.* v. *Parish*, (1913) 2 Ch. 444; 82 L. J. Ch. 562 (breach of bye-laws)."

Page 35 (*q*). *Add* "*Phillimore* v. *Watford Rural Council*, (1913) 2 Ch. p. 443; 82 L. J. Ch. p. 519."

Page 35 (*t*). *After* "*Jones* v. *Llanrwst Urban Council*" (p. 36), *add* "*Phillimore* v. *Watford Rural Council*, (1913) 2 Ch. 443; 82 L. J. Ch. 519."

Page 39 (*o*). }
Page 41 (*y*). } *Att.-Gen.* v. *Parish* is also reported (1913) 2 Ch. 444;
Page 43 (*l*). } 82 L. J. Ch. 562.

Page 45 (*s*). *After* "*Senior* v. *Pawson*," *add* "See *Att.-Gen.* v. *Parish*, (1913), 2 Ch. 444; 82 L. J. Ch. 562, where a mandatory injunction was granted for the removal of a house erected (before issue of the writ) in advance of the prescribed building line."

Page 45 (*u*). *Add* "*Att.-Gen.* v. *Parish*, (1913) 2 Ch. 444; 82 L. J. Ch. 562."

Page 46 (*b*). } *Worcester College* v. *Oxford Canal Navigation* is also reported
Page 46 (*c*). } 105 L. T. 501.

Page 46 (*e*). *Add* "See *Dover Picture Palace Co.* v. *Dover Corporation*, (1913) 11 L. G. R. 971."

Page 70 (*y*). *In re Morrison, Jones and Taylor*, affirmed in C. A., and now reported (1914) 1 Ch. 50; 30 T. L. R. 59.

Page 74 (*d*). *In re Hanbury's Settled Estates* is also reported 82 L. J. Ch. 430.

Page 104 (*r*). *King* v. *Brown, Durrant & Co.* is also reported 82 L. J. Ch. 548; 109 L. T. 69.

Page 105 (*x*). "*Lewis* v. *Meredith*," *for* "108 L. T. 349," *read* "108 L. T. 549; also reported 82 L. J. Ch. 255."

Hope v. *Osborne* is also reported 82 L. J. Ch. 457; 109 L. T. 41.

After "*King* v. *Brown*," *add* "See *Hampstead Garden Suburb Trust* v. *Denbow*, (1913) 77 J. P. 318, where an injunction was granted to restrain the holding of meetings on private roads."

Page 106 (*d*). *After* "*Cope* v. *Sharpe*" *add* "Cf. *Kirby* v. *Chessum*, (1913) 30 T. L. R. 15."

Page 107 (*g*). } *Kynock & Co.* v. *Rowlands* is also reported 81 L. J. Ch.
Page 109 (*z*). } 340.

Page 110 (*e*). *Add* "*White* v. *London General Omnibus Co.*, (1914) W. N. 78; 49 L. J. N. C. 114."

Page 110 (*e*). } *Add* "*Dover Picture Palace Co.* v. *Dover Corporation*,
Page 111 (*h*). } (1913) 11 L. G. R. 971."

Page 112 (*m*). *For* "(1913) 28 T. L. R. 261," *read* "(1912) 28 T. L. R. 261."

Page 137 (*c*). *Great Central Railway Co.* v. *Midland Railway Co.*, affirmed in H. L. on other grounds, (1913) 30 T. L. R. 33; 33 W. N. 294.

Page 143 (*l*). *Att.-Gen.* v. *Parish* is also reported (1913) 2 Ch. 444; 82 L. J. Ch. 562.

Page 148 (*c*). *Add* "*Middleton* v. *Humphries*, (1913) 47 Ir. L. T. 160, where an injunction was granted to restrain the defendant from allowing the roots of his trees to damage the plaintiff's wall."

Page 152 (*s*). } *Add* "*White* v. *London General Omnibus Co.*, (1914) W. N.
Page 153 (*z*). } 78; 49 L. J. N. C. 114."

Page 177 (*t*). *Add* "*Davis* v. *Marrable*, (1913) 2 Ch. 421, 432; 82 L. J. Ch. 510."

Page 178 (*b*). *Add* "See *White* v. *London General Omnibus Co.*, (1914) W. N. 78; 49 L. J. N. C. 114."

Page 179 (*f*). *Add* "*Davis* v. *Marrable*, (1913) 2 Ch. 421; 82 L. J. Ch. 510."

Page 179 (*g*). *Davis* v. *Marrable* is now reported (1913) 2 Ch. 421; 82 L. J. Ch. 510.

Page 179 (*h*). *Add* "And see *Davis* v. *Marrable*, *supra*, where the height of a building on the servient tenement had been raised in one part, the lowered in another part, so that the total amount of light coming to but dominant tenement was not diminished."

Page 196. *After* "(*r*)," *add* "And see *Bailey* v. *Holborn and Frascati, Ltd*, (1914) W. N. 66; 49 L. J. N. C. 114 (acquiescence in previous interference by other persons)."

Page 203 (*t*). *Add* "*Bedford* v. *Leeds Corporation*, (1913) 77 J. P. 430."

Page 204 (*a*). *Add* "See *Bedford* v. *Leeds Corporation*, (1913) 77 J. P. 430 (fair)."

Page 204 (*d*). *Add* "*De Keyser's Royal Hotel* v. *Spicer Bros.*, (1914) 30 T. L. R. 257 (pile driving between 10 p.m. and 6 a.m.)."

Page 205, 7th line. *Add* "But an injunction was granted to restrain pile driving between the hours of 10 p.m. and 6 a.m., as being unreasonable (*De Keyser's Royal Hotel* v. *Spicer Bros.*, (1914) 30 T. L. R. 257)."

Page 205, 15th line. *After* "(*n*)," *add* "allowing the roots of trees to spread under an adjoining owner's land and injure his wall (*Middleton* v. *Humphries*, (1913) 47 Ir. L. T. 160)."

Page 206 (*e*). *Lyons* v. *Gulliver*, affirmed in C. A., 30 T. L. R. 75; 58 S. J. 97 (Phillimore, L.J., *diss.*).

Page 254 (*l*). *Add* "*Charing Cross and West End Supply Co.* v. *London Hydraulic Power Co.*, (1913) 3 K. B. 442; (1914) 83 L. J. K. B. 116 (escape of water through bursting of mains)."

Page 278 (*c*). }
Page 280 (*n*). } *White* v. *Grand Hotel, Eastbourne*, affirmed in H. L., (1913)
Page 282 (*g*). } 58 S. J. 117; W. N. 306.

Page 293 (*g*). *Add* "*White* v. *London General Omnibus Co.*, (1914) W. N. 78; 49 L. J. N. C. 114."

Page 294 (*i*). *For* "(1912)" *read* "(1911)."

Page 297 (*f*). *For* "82 L. J. Ch. 673," *read* "82 L. J. Ch. 73."

Page 299 (*r*). }
Page 306 (*g*). } *Tottenham Urban Council* v. *Rowley*, affirmed in H. L. *sub nom. Rowley* v. *Tottenham Urban Council*, (1913)
Page 307 (*n*). } 30 T. L. R. 168; W. N. 367.

Page 309 (*b*). *Lyons & Co.* v. *Capital Syndicate*, affirmed in C. A., (1913) 30 T. L. R. 75; 58 S. J. 97 (Phillimore, L.J., *diss.*).

Page 309 (*c*). "*Att.-Gen.* v. *Sharpness New Docks Co.*," *delete* "(1913)"

K. B. 440, 441 ; 82 L. J. K. B. p. 198," *and substitute* " (1914) 49 L. J. N. C. 82 ; 136 L. T. Jo. 376."

Page 341 (*k*). *New Inverted Incandescent Gas Lamp Co.* v. *Howlett*, affirmed in C. A., (1913) 30 R. P. C. 699.

Page 343 (*x*). *Add* "*Osram Lamp Works Co.* v. *Schloss & Co.*, (1913) 30 R. P. C. 359."

Page 357 (*c*). *For* "29 T. L. R. 117" *read* "29 L. T. J. 163."

Page 357 (*d*). *Yeatman* v. *Homberger* is also reported 29 T. L. R. 26.

Page 359 (*l*). *Delete* "R," *and insert before* "*W. & G. Du Cros*," "*Registrar of Trade Marks*." This case is now reported (1914) 83 L. J. Ch. 1.

Page 360 (*a*). *Add* "And see *Pink* v. *Sharwood*, (1913) 109 L. T. 594."

Page 363 (*p*). *Re Van der Leeuw* is also reported 81 L. J. Ch. 100.

Page 364 (*z*). *Brinsmead* v. *Brinsmead*, affirmed in C. A., 29 T. L. R. 706 ; 57 S. J. 716.

Page 369 (*z*). }
Page 370 (*c*). } *Add* "And see *Bowden Wire Co.* v. *Bowden Brake Co.*, (1913) 30 R. P. C. 609."
Page 370 (*d*). }

Page 371 (*i*). *Add* "See *Pink* v. *Sharwood*, (1913) 109 L. T. 594."

Page 372, end of last paragraph. *Add* "And the same principles apply in the case of a sale by a trustee under a deed of assignment by a debtor for the benefit of his creditors (*Green & Sons* (*Northampton*) v. *Morris*, (1914) W. N. 65 ; 49 L. J. N. C. 99)."

Page 375 (*i*). *Yeatman* v. *Homberger & Co.*, affirmed in C. A., 107 L. T. 742 ; 29 T. L. R. 26.

Page 387 (*o*). *Add* "*Brinsmead* v. *Brinsmead*, (1913) 29 T. L. R. p. 239."

Page 389 (*d*). } *After* "*Litholite Co.* v. *Travis & Insulators Co.*," *add*
Page 391 (*f*). } "532."

Page 391, 3rd line (3). See *Corelli* v. *Gray*, (1913) 30 T. L. R. 116.

Page 391 (*a*). *Insert before* "As to the law before the Act," "*Monckton* v. *Pathé Frères Pathephone Co.*, (1914) 1 K. B. 395."

Page 392, 2nd line. *Insert after* "time tables (*o*)," "translations (*Byrne* v. *The Statist Co.*, (1914) 30 T. L. R. 254 ; W. N. 37)."

Page 394 (*m*). } *Add* "See *Byrne* v. *The Statist Co.*, (1914) 30 T. L. R.
Page 395 (*u*). } 254 ; W. N. 37."

Page 398 (*q*). *Rubens* v. *Pathé Frères Pathephone Co.*, affirmed in C. A. *sub nom. Monckton* v. *Pathé Frères Pathephone Co.*, (1913) 30 T. L. R. 123 ; (1914) 1 K. B. 395.

Page 402 (*q*). *Add* "See *Monckton* v. *Pathé Frères Pathephone Co.*, (1913) 30 T. L. R. 123 ; (1914) 1 K. B. 395."

Page 410 (*d*). }
Page 411 (*f*). } *After* "266," *add* "532"

Page 416 (*p*). *Add* "See *Byrne* v. *The Statist Co.*, (1914) 30 T. L. R. 254 ; W. N. 37."

Page 417 (*z*). *For* "(1913) 29 T. L. R. 72," *read* "(1913) 29 T. L. R. 572 ; affirmed in C. A., (1913) 30 T. L. R. 116."

Page 413 (*k*). *Add* "*Corelli* v. *Gray*, (1913) 29 T. L. R. 572 ; 30 T. L. R. 116."

Page 425 (*a*). }
Page 426 (*o*). } *Add* "See *Winkle* v. *Gent*, (1914) 31 R. P. C. 17."

Page 432 (*t*). *Add* "*Chapman* v. *Westerby*, (1913) 58 S. J. 50 ; W. N. 277."

Page 433 (*c*). *Add* "See *Kleinert* v. *Abosso Gold Mining Co.*, (1913) 58 S. J. 45."

Page 434 (*i*). *Sobey* v. *Sainsbury*, now also reported (1914) 83 L. J. Ch. 103.

Page 436 (*a*). }
Page 438 (*q*). } *Cave* v. *Horsell* is also reported 81 L. J. K. B. 981.
Page 443 (*z*). }

Page 436 (*z*). *Add* "See *Marshall and Murray, Ltd.* v. *Jones,* (1913) 29 T. L. R. 351."

Page 444 (*n*). *Hope Bros.* v. *Cowan* is also reported 82 L. J. Ch. 439.

Page 445 (*p*). *Charrington* v. *Wooder* is now reported (1913) 30 T. L. R. 176.

Page 448, 9th line. *After* "(*s*)" *add* "But a covenant not to use the demised premises except for the business of a hosier, including the sale of fancy waistcoats and mackintoshes, was held to have been broken by the sale of overcoats not being mackintoshes (*Wartski* v. *Menker,* 1914) 136 L. T. Jo. 377)."

Page 449 (*c*). *After* "*Premier Rinks Co.* v. *Cinematograph Co.*" *add* "*Shanly* v. *Wells* (1913) 29 T. L. R. 714."

Page 449 (*d*). *Lewis and Allenby* v. *Pegge* is now reported (1913) 58 S. J. 155.

Page 449 (*f*). *After* "*North Western Salt Co.* v. *Electrolytic Alkali Co.*, (1912) 107 L. T. 439, 444."

Page 450 (*k*). *After* "*Att.-Gen.* (*Australia*) v. *Adelaide Steamship Co.* is now reported (1913) 83 L. J. P. C. 84."

Page 451 (*m*). *Add* "*Eastes* v. *Russ,* (1914) 30 T. L. R. (p. 238."

Page 453 (*aa*). *Eastes* v. *Russ* is now reported (1914) 30 T. L. R. 237; 58 S. J. 234.

Page 456 (*uu*). *Substitute* "373 *for* "315." *Nevanas & Co.* v. *Walker* is now reported (1914) 30 T. L. R. 184; 49 L. J. N. C. 21.

Page 458 (*o*). *After* "*Att.-Gen.* (*Australia*) v. *Adelaide Steamship Co.*," *add* "(1914) 83 L. J. P. C. 84; *North Western Salt Co.* v. *Electrolytic Alkali Co.*, (1914) W. N. 73; 49 L. J. N. C. 112 (H. L.)."

Page 458 (*p*). *Dunlop Pneumatic Tyre Co.* v. *Selfridge,* reversed in C. A., (1914) 30 T. L. R. 250; W. N. 59, on the ground that there was no contract between the plaintiffs and defendants.

Page 459, 4th line. *Insert before the word* "illegal," "on the face of it."

Page 459 (*r*). *For* "439, 446," *read* "446." *North Western Salt Co.* v. *Electrolytic Alkali Co.* is also reported (1913) 3 K. B. 422; affirmed on this point in H. L., (1914) W. N. 73; 49 L. J. N. C. 112.

Page 460 (*u*). *Caribonum Co.* v. *Le Couch,* affirmed in C. A., (1913) 109 L. T. 587.

Nevanas & Co. v. *Walker* is now reported (1914) 30 T. L. R. 184; 49 L. J. N. C. 21.

Page 461 (*m*). *Add* "See *Marshall and Murray, Ltd.* v. *Jones,* (1913) 29 T. L. R. 351."

Page 462, 9th line. *Add* "So also a covenant by an employee engaged at a dairy that he would not, after leaving his employer's service, interfere with the customers served from the said dairy, was held not to [illegible] broken by his soliciting customers served from other premises to which business had been moved (*Marshall and Murray, Ltd.* v. *Jones,* [illegible] T. L. R. 351)."

Page 462 (*n*). } *Mason* v. *Provident Clothing Co.* is also reported
Page 465 (*q*). } L. J. K. B. 1153.
Page 462 (*q*).
Page 462 (*r*). }
Page 463 (*u*). } *Add* "See *Dwyer-Smith* v. [illegible]*adsley,* (1913) 108 [illegible] 89."
Page 463 (*x*). }
Page 476 (*d*). }
Page 477 (*h*). } *After* "*Kirchner* v. *Grubam*," *add* "*Chapman* v. [illegible]*sterby,*
Page 482 (*k*). } (1913) 58 S. J. 50; W. N. 277.

Page 482 (*m*). *Dunlop Pneumatic Tyre Co.* v. *Selfridge,* reversed in C. A. (1914) 30 T. L. R. 250; W. N. 59, on the ground that there was no contract between the plaintiffs and defendants.

Page 483 (*o*). *Add* "*Columbia Phonograph Co.* v. *Regent's Fittings Co.*, (1913) 30 R. P. C. 484."

Page 484 (*y*). *Add* "*Millbourn* v. *Lyons*, (1914) 1 Ch. 34, 40; 109 L. T. 797."

Page 486 (*o*). (*Sobey* v. *Sainsbury* is now reported (1914) 83 L. J. Ch.

Page 494 (*z*).) 103.

Page [illegible] (*a*).

Page [illegible] 4 (*g*) [illegible] (1913) 30 R. P. C. 266," *add* "532."

Page 507 (*b*

Page 519 [illegible] *Cobbold*," "272," *read* "*Cobbett*," "271."

Page 525 *Add* "Cf. *Mitchell* v. *East Sussex C. C.*, (1913) 58 S. J. 66."

Page 533, 9th line. *After* "debtor" *add* "or from his trustee under a deed of assig[illegible] for the benefit of his creditors (*Green* & *Sons* (*Northampton*) v. *Morris*, (1914) W. N. 65: 49 L. J. N. C. 99)."

Page [illegible] (*c*). *Add* "*Dover Harbour Palace Co.* v. *Dover Corporation*, (1913) [illegible] G. R. 67."

Page [illegible] *r*). *Add* "*Basingstoke Council* (*Basingstoke Canal*) *Act*, 1911, also reported (1911) [illegible] L. [illegible] 125."

Add [illegible] v. [illegible] *Railway Co.*, (1913) S. C. [illegible] 49 (sale of remanent [illegible] *y*)

Page 567 [illegible]). [illegible] v. [illegible] *son* is also reported (19[illegible]2 L. J. [illegible] B. p. 67).

Page 571 (*q* [illegible] *y Co.* *Midland Railway Co.* is also [illegible]ted (19[illegible] J.

[illegible]e 60 [illegible] now reported (1914) 1 Ch. 94.

[illegible]ge 61 *The Border* is now reported (1914) 83 L. J. K. B. 139.

[illegible]ge 63 *The Republic of Bolivia Exploration Syndicate* is now [illegible]rted (19[illegible] Ch. 139; 30 T. L. R. 78.

[illegible]ge 64 *Golaja* v. *Welch* is now reported (1914) Ch. 213; 109 [illegible]2)

[illegible] *After* "*Leney* v. *Callingham*," *add* "See *Commen* v. *Hayward* (1[illegible] K. B. 150; 82 L. J. K. B. 117 (decided in Order XII., r. 3, County Court Rules, 1903, 1904)."

A TREATISE

ON THE

LAW AND PRACTICE OF INJUNCTIONS.

CHAPTER I.

INJUNCTIONS IN GENERAL.

Under the old practice

An injunction was under the old procedure a writ issuing by order and under seal of the Court of Chancery. A writ of injunction may be described as a judicial process whereby a party was required to do a particular thing or to refrain from doing a particular thing according to the exigency of the writ. The process, however, was rather preventive than restorative, though it was by no means confined to the former object. When commanding an act to be done, it issued after decree, and was in the nature of an execution to enforce the same; as, for instance, it might contain a direction to the party defendant to yield up or to quit the possession of the land or other property which constituted the subject-matter of the decree in favour of the other party (*a*).

Under modern procedure.

Under the present procedure no writ of injunction is to issue. An injunction is by judgment or order, and such judgment or order has the effect which a writ of injunction previously had (*b*).

Perpetual injunctions.

Injunctions are either *interlocutory* or *perpetual*. *Interlocutory injunctions* are such as are to continue until the hearing of the cause upon the merits, or generally until further order. *Perpetual injunctions* are such as form part

(*a*) Gilb. For. Rom., ch. 11, 194, 195; *Stribl.* v. *Hawke*, 3 Atk. 275; *Huguenin* v. *Basley*, 15 Ves. 180; 9 R. R. 148, 276.

(*b*) Ord. L. r. 11.

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of the decree made at the hearing upon the merits (*c*). The perpetual injunction is in effect a decree, and concludes a right.

Interlocutory injunction.

The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to keep matters *in statu quo* until the hearing or further order (*d*). In interfering by interlocutory injunction, the Court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime *in statu quo*. A man who comes to the Court for an interlocutory injunction, is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition, until such question can be disposed of (*e*).

(*c*) Gilb. For. Rom. 194, 195.

(*d*) *Black Point Syndicate* v. *Eastern Concessions Co.*, 79 L. T. 660; *Leney & Co.* v. *Callingham and Thompson*, (1908) 1 K. B. p. 84; 77 L. J. K. B. p. 67; *Jones* v. *Pacaya Rubber Co.*, (1911) 1 K. B. p. 457; 80 L. J. K. B. p. 156.

(*e*) *Glascott* v. *Lang*, 3 M. & C. 451, 455; *Hilton* v. *Lord Granville*, Cr. & Ph. 283, 292; 10 L. J. Ch. 398, 401; 54 R. R. 297; *Great Western Railway Co.* v. *Birmingham and Oxford Junction Railway Co.*, 2 Ph. 597, 603; 17 L. J. Ch. 245; 78 R. R. 209; *Dyke* v. *Taylor*, 3 De G. F. & J. 467; 30 L. J. Ch. 284; *Walker* v. *Jones*, L. R. 1 P. C. 50, 61; 35 L. J. P. C. 36; *Preston* v. *Luck*, 27 C. D. 505, 506, *per* Cotton, L.J.; *Challender* v. *Royle*, 36 C D. 425, 436, 443; 56 L. J. Ch. 995, 1002; *Mogul Steamship Co.* v. *McGregor*, 15 Q. B. D. 476; 54 L. J. Q. B. 540; *Jones* v. *Pacaya Rubber Co.*, *supra*. See, however, as to granting interlocutory injunctions in libel actions, *post*, Chap. XII.

CHAPTER II.

THE NATURE AND LIMITS OF THE JURISDICTION OF THE HIGH COURT OF JUSTICE BY INJUNCTION.

Jurisdiction formerly confined to Chancery.

UNDER the former procedure, the jurisdiction by injunction to restrain the doing of wrongful acts was a jurisdiction which could only be exercised by the Court of Chancery. The Courts of common law had by the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125 (*a*), been empowered to grant injunctions in particular cases; and by the 15 & 16 Vict. c. 83, had been empowered to grant injunctions in patent cases; but until the Judicature Act, 1873, the remedy by injunction continued to be, with these exceptions, a remedy peculiar to the Court of Chancery. By that Act, 36 & 37 Vict. c. 66, s. 16, all the jurisdiction of the Court of Chancery was transferred to the High Court of Justice (*b*); and by sect. 25, sub-sect. 8, it is declared that:

Sect. 25, sub sect. 8, of Judicature Act, 1873.

> "A mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained

(*a*) Sections 81, 82. These sections were repealed by the Statute Law Revision Act, 1883.

(*b*) See *Warner* v. *Murdoch*, 4 C. D. 752; 46 L. J. Ch. 121.

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under any colour of title; and whether the estates claimed by both or either of the parties are legal or equitable."

The effect of sect. 25, sub-sect. 8, of the Judicature Act, 1873.

This enactment (*c*) does "not confer an arbitrary or an unregulated discretion on the Court and does not authorize the Court to invent new modes of enforcing judgments in substitution for the ordinary modes" (*d*). It does "not mean that the Court is to grant an injunction simply because it thinks it convenient. It means that the Court should grant an injunction for the protection of rights or the prevention of injury according to legal principles" (*e*). This sub-section (*f*) does not enable the Court to issue an injunction in a case in which before the Act there was no legal right on the one side or no legal liability on the other side, either at law or in equity (*g*) It was not intended by the enactment "to give the right to an injunction to parties who before had no legal right whatever, but simply to give to the Court, when dealing with legal rights which were under its jurisdiction independently of this section, power, if it should think it just or convenient, to superadd to what would have been previously the remedy, a remedy by way of injunction, altering therefore not in any way the rights of parties, so as to give a right to those who had no legal right before, but enabling the Court to modify the principle on which it had previously proceeded in granting injunctions, so that where there is a legal right the Court may, without being hampered by its old rules, grant an injunction where it is just or convenient to do so for the purpose of protecting or asserting the legal rights of the parties. . . . All that was done by this section was to give to the High Court power to give a remedy which formerly would not have been given in that particular case, but still only a remedy in defence of or to enforce rights, which according to

(*c*) 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

(*d*) *Doherty* v. *Allman*, 3 A. C. p. 728; *Harris* v. *Beauchamp Bros.*, (1894) 1 Q. B. p. 809; 63 L. J. Q. B. p. 484.

(*e*) *Per* Jessel, M.R., in *Aslatt* v. *Corporation of Southampton*, 16 C. D. p. 148; 50 L. J. Ch. p. 33.

(*f*) 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

(*g*) *Per* Brett, L.J., in *North London Railway Co.* v. *Great Northern Railway Co.*, 11 Q. B. D. p. 38; 52 L. J. Q. B. p. 383; and see *Kitts* v. *Moore*, (1895) 1 Q. B. 253, 263; 64 L. J. Ch. 152, 157.

law were previously existing and capable of being enforced in some or one of the different divisions which are now united in the High Court. . . . The sole intention of the section is this: that where there is a legal right which was, independently of the Act, capable of being enforced either at law or in equity, then, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right" (*h*).

As was said in a recent case, the enactment in question "has not revolutionised the law, but it has enabled the Court to grant injunctions and receivers in cases in which it used not to do so previously. I will not say where it had no jurisdiction to do so, that would be going too far, but where in practice it never did so" (*i*).

It was not the practice of the old Court of Chancery to interfere by injunction where there was a legal right in question which was being put in course for trial at law. Accordingly in *Reg.* v. *Mayor of Dover* (*k*), the Court of Queen's Bench decided, two years after the issue of the writ and a year after the mayor had left office, that he had no right to be mayor at all. But under the Judicature Act it seems that where independently of that Act there is a right that can be asserted either at law or in equity, the Court can grant an injunction whether interlocutory or perpetual in protection of the right (*l*).

The effect of sect. 25, sub sect. 8, of the Judicature Act, 1873.

Accordingly, in *Aslatt* v. *Mayor of Southampton* (*m*), although there was a remedy at law by *quo warranto* and before the Judicature Act an injunction would not have been granted, the Court restrained the corporation by injunction from declaring the plaintiff's office void, on the ground that

(*h*) *Per* Cotton, L.J., in *North London Railway Co.* v. *Great Northern Railway Co.*, 11 Q. B. D. 39, 40; 52 L. J. Q. B. 380; *Holmes* v. *Millage*, (1893) 1 Q. B. p. 557; 62 L. J. Q. B. 384.

(*i*) *Cummins* v. *Perkins*, (1899) 1 Ch. p. 20; 68 L. J. Ch. p. 59, *per* Lindley, M.R. See, however, *Kitts* v. *Moore*, (1895) 1 Q. B. 253; 64 L. J. Ch. 152.

(*k*) Cited by Jessel, M.R., in *Aslatt* v. *Mayor of Southampton*, 16 C. D. p. 148; 50 L. J. Ch. p. 33.

(*l*) *Richardson* v. *Methley School Board*, (1893) 3 Ch. 510; 62 L. J. Ch. 943.

(*m*) 16 C. D. 148; 50 L. J. Ch. 33.

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the injunction was required in order to do effectual justice. So also in *Stannard* v. *Vestry of St. Giles* (*n*), and in *Hedley* v. *Bates* (*o*), where there was before the Judicature Act a right to apply to a Court of common law for a prohibition, Jessel, M.R., when he had the parties before him, instead of sending them to get a prohibition, granted an injunction against the person who was seeking to go before the wrong tribunal.

Again, the Court will, since the Judicature Act, in a proper case, restrain the publication of a libel (*q*); or the making of slanderous statements calculated to injure another in his business (*r*). But it is only in the clearest cases of libel or slander that the Court will interfere by injunction, and especially by interlocutory injunction (*s*).

Judicature Acts have not altered the principles on which injunctions are granted.

The Judicature Acts, however, have not altered the principles on which the Court acts in granting injunctions where principles have been established as just and convenient (*t*). "The very first principle of injunction law is that *primâ facie* you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy" (*u*). Nor will an injunction be granted where the case is one, not of legal injury, but of mere inconvenience (*x*). Moreover, an injunc-

(*n*) 20 C. D. 190; 51 L. J. Ch. 629. See *Wood* v. *Connolly & Co.*, (1911) 1 Ch. 731, 740; 80 L. J. Ch. 409, 413.

(*o*) 13 C. D. 498; 49 L. J. Ch. 170. See also *The Teresa*, 71 L. T. 343; *Wood* v. *Connolly & Co.*, *supra*.

(*q*) *Thomas* v. *Williams*, 14 C. D. 864, 867; 49 L. J. Ch. 605; *Quartz Hill, &c. Mining Co.* v. *Beall*, 20 C. D. 501; 51 L. J. Ch. 874; *Hayward* v. *H.*, 34 C. D. 198; *Bonnard* v. *Perryman*, (1891) 2 Ch. p. 283; 60 L. J. Ch. 617; *Collard* v. *Marshall*, (1892) 1 Ch. 571; 61 L. J. Ch. 268; *post*, Chap. XII.

(*r*) *Loog* v. *Bean*, 26 C. D. 306; 53 L. J. Ch. 1128; and see *post*, Chap. XII.

(*s*) *Liverpool Household Stores* v. *Smith*, 37 C. D. 170; 57 L. J. Ch. 85; *Bonnard* v. *Perryman*, (1891) 2 Ch. 269; and see *Monson* v. *Tussaud's, Ltd.*, (1894) 1 Q. B. 671; 63 L. J. Q. B. 454; *Lloyd's Bank, Ltd.* v. *Royal British Bank, Ltd.*, (1903) 19 T. L. R. 548; *Corelli* v. *Wall*, (1906) 22 T. L. R. 532; and *Watson* v. *Daily Record (Glasgow)*, (1907) 1 K. B. 859; 76 L. J. K. B. 453; and *post*, Chap. XII.

(*t*) *Gaskin* v. *Balls*, 13 Ch. D. 329, *per* Thesiger, L.J.

(*u*) *Per* Lindley, L.J., in *London and Blackwall Railway Co.* v. *Cross*, 31 C. D. p. 369.

(*x*) *Day* v. *Brownrigg*, 10 C. D. 294; 48 L. J. Ch. 173.

tion will not be granted in a trivial case (*y*), nor where it is not required, the plaintiff having the remedy in his own hands (*z*).

It was not the function or practice of the Court of Chancery to restrain men from prosecuting frivolous, litigious or desperate suits merely because they are so (*a*). Nor has the Court under the Judicature Acts jurisdiction to interfere by injunction upon a false assumption of authority. The Court has no general jurisdiction to restrain persons from acting without authority, and an injunction cannot be granted to restrain a person from taking proceedings out of Court in the name of a person who has given no authority to use it (*b*).

In like manner the Court has no jurisdiction to restrain a party from proceeding with an arbitration in a manner not authorised by the agreement to refer, although such arbitration may be futile and vexatious (*c*). But the Court will, in a proper case, restrain a party from proceeding with an arbitration if an action is pending impeaching the instrument which contains the agreement to refer (*d*).

No jurisdiction to interfere with public duties of a department of Government.

The Court has no jurisdiction to interfere with the public duties of any of the departments of Government (*e*), or with the sovereign acts of a foreign government (*f*), or to enforce

(*y*) *Llandudno Urban Council* v. *Woods*, (1899) 2 Ch. 705; 68 L. J. Ch. 623; *Behrens* v. *Richards*, (1905) 2 Ch. 614, 622; 74 L. J. Ch. 619, 620; *Fielden* v. *Cox*, (1906) 22 T. L. R. 411; *English* v. *Metropolitan Water Board*, (1907) 1 K. B. 588, 603; 76 L. J. K. B. 361, 371; *Society of Architects* v. *Kendrick*, (1910) 102 L. T. 526; 26 T. L. R. 433; see as to enforcing by-laws, *Att.-Gen.* v. *Gibb*, (1909) 2 Ch. p. 277; 78 L. J. Ch. p. 527.

(*z*) *Elliman* v. *Carrington*, (1901) 2 Ch. 275, 279; 70 L. J. Ch. 577, 580; *Harrington* (*Earl*) v. *Derby Corporation*, (1905) 1 Ch. 205, 221; 74 L. J. Ch. 219, 227.

(*a*) *Pennell* v. *Roy*, 3 De G. M. & G. 133; 22 L. J. Ch. 414; 98 R. R. 78.

(*b*) *London and Blackwall Railway Co.* v. *Cross*, 31 Ch. D. 354, 371; 55 L. J. Ch. 313, 314.

(*c*) *North London Railway Co.* v. *Great Northern Railway Co.*, 11 Q. B. D. 30; 52 L. J. Q. B. 380; and see *Wood* v. *Lillies*, 61 L. J. Ch. 158; *Farrar* v. *Cooper*, 44 C. D. p. 328; 58 L. J. Ch. p. 508.

(*d*) *Kitts* v. *Moore*, (1895) 1 Q. B. 253; 64 L. J. Ch. 152. As to restraining arbitration proceedings, see *post*, Chap. XXI.

(*e*) See *Ellis* v. *Grey*, 6 Sim. 214, 223; 2 L. J. (N. S.) Ch. 181; 38 R. R. 93; *Raleigh* v. *Goschen*, (1898) 1 Ch. 73; 67 L. J. Ch. 59.

(*f*) *Gladstone* v. *Ottoman Bank*, 1 H. & M. 505; 32 L. J. Ch. 228,

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the contracts of a foreign government against the property of such government in England (*g*), or to prevent a foreign sovereign from removing his property in this country (*h*), or to make a decree against a foreign ambassador who does not submit to the jurisdiction (*i*).

No jurisdiction in matters merely criminal or immoral.

The Court will not interfere by injunction in matters merely criminal or immoral, which do not affect any right to property (*k*). But if an act which is criminal touches also the enjoyment of property, the Court has jurisdiction, but its interference is founded solely on the ground of injury to property (*l*).

Criminal proceedings.

The Court will not, it seems, interfere by injunction to prevent criminal proceedings being taken by a plaintiff against the defendant in a pending action, notwithstanding that the criminal proceedings and the action are both based on the same wrongful act, unless the objects are identical (*m*).

Proceedings before magistrates.

Nor will the Court, as a general rule, interfere by injunction with proceedings before magistrates for the recovery of penalties for the breach of statutes (*n*), unless the Attorney-General is a party (*o*).

(*g*) *Smith* v. *Weguelin*, 8 Eq. 198; 38 L. J. Ch. 465; *Twycross* v. *Dreyfus*, 5 C. D. 605; 46 L. J. Ch. 510.

(*h*) *Vavasour* v. *Krupp*, 9 C. D. 351; 39 L. T. 437.

(*i*) *Gladstone* v. *Musurus Bey*, 1 H. & M. 495; 32 L. J. Ch. 228. See *Musurus Bey* v. *Gadban*, (1894) 2 Q. B. 352; 63 L. J. Q. B. 621.

(*k*) *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. p. 320; 22 L. J. Ch. 811; 98 R. R. 151; *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217, 239, 253; 30 L. J. Ch. 690, 712; *Springfield Spinning Co.* v. *Riley*, 6 Eq. 551; 37 L. J. Ch. 889; *Stevens* v. *Chown*, (1901) 1 Ch. p. 904; 70 L. J. Ch. p. 575.

(*l*) *Macaulay* v. *Schakell*, 1 Bli. (N. S.) P. C. p. 127; 3 L. J. (O. S.) Ch. 30; *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. 320; 22 L. J. Ch. 811; 98 R. R. 151; *Emperor of Austria* v. *Day*, 3 De G. F. & J. 253; 30 L. J. Ch. 690; *Mogul Steamship Co.* v. *Macgregor*, 15 Q. B. D. 476; 54 L. J. Q. B. 540.

(*m*) *Saull* v. *Browne*, 10 Ch. 64; 44 L. J. Ch. 1; *Kerr* v. *Mayor of Preston*, 6 C. D. p. 467; 46 L. J. Ch. 409, 410; *Grand Junction Waterworks Co.* v. *Hampton Urban Council*, (1898) 2 Ch. 341, 342; 67 L. J. Ch. p. 608.

(*n*) *Kerr* v. *Mayor of Preston*, 6 C. D. p. 467; 46 L. J. Ch. 409, 410; *Stannard* v. *Camberwell Vestry*, 20 C. D. 190, 196; 51 L. J. Ch. 629, 632; *Grand Junction Waterworks Co.* v. *Hampton*, (1898) 2 Ch. 341, 342, 344; 67 L. J. Ch. p. 610; *Devonport Corporation* v. *Tozer*, (1902) 2 Ch. p. 195, (1903) 1 Ch.

For note (*o*) see p. 9.

Special tribunal provided by statute.

Nor where the Legislature has provided a special tribunal for the decision of a question, should the Court, except in very special cases, interfere by injunction or declaration of right (*p*).

Special remedy provided by statute for infringement of "a right of property."

Where a statute provides a particular remedy for the infringement of a "right of property," the jurisdiction of the Court to protect the right by injunction is not excluded, unless the statute so provides (*q*).

Future breaches of statute, restrained though special statutory remedy, or penalty.

And where there has been a breach of a statutory enactment, for which the sole remedy provided is a penalty, an injunction may be granted to prevent future breaches which are threatened (*r*).

Winding up company.

In the winding up of a company, the Court has jurisdiction to restrain by injunction *quasi* criminal proceedings which are being taken against the company to recover penalties (*s*). So also where a petition has been presented for winding up a company, the Court has jurisdiction to restrain proceedings

759, 764; 72 L. J. Ch. p. 416; *Merrick* v. *Liverpool Corporation*, (1910) 2 Ch. 449, 460; 79 L. J. Ch. 751, 756.

(*o*) *Att.-Gen.* v. *Ashbourne Recreation Ground*, (1903) 1 Ch. 101, 107; 72 L. J. Ch. p. 69; *Devonport* v. *Tozer*, (1903) 1 Ch. 759; 72 L. J. Ch. 411; *Att.-Gen.* v. *Wimbledon House Estate Co.*, (1904) 2 Ch. 34, 41; 73 L. J. Ch. p. 595; *Att.-Gen.* v. *Pontypridd Waterworks Co.*, (1908) 1 Ch. 398, 399; 77 L. J. Ch. 237, 239.

(*p*) *Stannard* v. *Camberwell Vestry*, 20 C. D. 190; 51 L. J. Ch. 629; *Grand Junction Waterworks Co.* v. *Hampton*, (1898) 2 Ch. p. 331; 67 L. J. Ch. 603; *Devonport Corporation* v. *Tozer*, (1902) 2 Ch. p. 195; (1903) 1 Ch. p. 764; 72 L. J. Ch. 416; *Burghes* v. *Att.-Gen.*, (1911) 2 Ch. 156, 157; 80 L. J. Ch. p. 516. See *Elsdon* v. *Hampstead Corporation*, (1905) 2 Ch. 633, 642; 75 L. J. Ch. p. 32; cf. *Att.-Gen.* v. *Staffordshire County Council*, (1905) 1 Ch. p. 344; *Att.-Gen.* v. *Pontypridd Waterworks Co.*, *supra*.

(*q*) *Cooper* v. *Whittingham*, 15 C. D. 506, 507; 49 L. J. Ch. 752, 755; *Stevens* v. *Chown*, (1901) 1 Ch. 904, 906; 70 L. J. Ch. 570, 575; *Att.-Gen.* v. *Ashbourne Recreation Ground*, (1903) 1 Ch. p. 107; 72 L. J. Ch. p. 69; *Att.-Gen.* v. *Wimbledon House Estate Co.*, (1904) 2 Ch. 34, 41: 73 L. J. Ch. 593, 595; and see *Carlton Illustrators* v. *Coleman & Co.*, (1911) 1 K. B. 782, 783; 80 L. J. K. B. p. 515; *Fraser* v. *Fear*, (1912) 107 L. T. 424, 428; 57 S. J. 29.

(*r*) *Cooper* v. *Whittingham*, *supra*, p. 507; 49 L. J. Ch. 752, 755; *Att.-Gen.* v. *Ashbourne Recreation Ground*, *supra*; *Carlton Illustrators* v. *Coleman*, *supra*.

(*s*) *Re Briton, etc., Life Association*, 32 C. D. 50; 39 C. D. p. 64; 57 L. J. Ch. 874, decided under sect. 85, Companies Act, 1862. See

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on a summons for enforcing poor rates owing by the company (*t*).

Political matters.

Matters of a political nature do not come within the jurisdiction of the Court. The Court will not interfere with the view of preventing revolution in a foreign country, or in favour either of the prerogative of a foreign sovereign or the political rights of his subjects, or in aid of the revenue laws of a foreign country. But if a case of injury to the property of a foreign sovereign or his government or his subjects be made out, the Court has jurisdiction to interfere at the suit of a foreign sovereign (*u*).

Contracts made abroad.

The Court will not enforce a contract entered into abroad, although it be valid by the law of the country in which it was made, in cases where the Court deems the contract to be in contravention of some essential principle of justice or morality (*x*).

Foreign judgments.

In actions *in personam* the Court will enforce foreign judgments, (i.) where the defendant is a subject of the foreign country in which the judgment has been obtained; (ii.) where he was resident in the foreign country when the action began; (iii.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (iv.) where he has voluntarily appeared; and (v.) where he has contracted to submit himself to the forum in which the judgment was obtained (*y*), but the fact of possessing property situate in a foreign country, or the fact of entering into a contract in such country dealing with that property, does not give the

now sect. 140, Companies (Consolidation) Act, 1908.

(*t*) *Re Flint, etc., Co.*, 56 L. J. Ch. 232; *In re Wearmouth Crown Glass Co.*, 19 C. D. 640; and see sect. 140, *supra* (*s*).

(*u*) *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217; 30 L. J. Ch. 690; *United States* v. *Prioleau*, 2 H. & M. 559; 2 Eq. 659; 35 L. J. Ch. 7.

(*x*) *Emperor of Austria* v. *Day*, *supra*; *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L. J. Ch. 417; 114 R. R. 306; *Rousillon* v. *Rousillon*, 14 C. D 351; 49 L. J. Ch. 338; *Kaufman* v. *Gerson*, (1904) 1 K. B. 591; 73 L. J. K. B. 320; *Re Fitzgerald, Surman* v. *Fitzgerald*, (1904) 1 Ch. 573, 597; 73 L. J. Ch. 436; *Moulis* v. *Owen*, (1907) 1 K. B. 746; 76 L. J. K. B. 396; *Saxby* v. *Fulton*, (1909) 2 K. B. p. 232; 78 L. J. K. B. p. 794.

(*y*) *Rousillon* v. *Rousillon*, 14 C. D. p. 371: 49 L. J. Ch. 338, 344; *Emanuel* v. *Symon*, (1908) 1 K. B. 302, 309; 77 L. J. K. B. 180, 185,

Courts of the foreign country jurisdiction in an action *in personam* over a British subject who was not resident in the foreign country at the date of the action, and who has not appeared in the proceedings, nor agreed to submit to the jurisdiction of the foreign Court (*z*).

Injunction operates *in personam*.

In granting injunctions the Court operates *in personam*. The person to whom its orders are addressed must be within the reach of the Court or amenable to its jurisdiction (*a*). But the Court will not suffer any one within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction (*b*).

As a consequence of the rule, that in granting an injunction the Court operates *in personam*, the Court may exercise jurisdiction independently of the locality of the act to be done, provided the person against whom relief is sought is within the reach and amenable to the process of the Court. This jurisdiction is not grounded upon any pretension to the exercise of judicial or administrative rights abroad, but on the circumstance of the person to whom the order is addressed being within the reach of the Court (*c*). But an English Court will not pronounce a decree, even *in personam*, which can have no specific operation without the intervention of a foreign Court, and which in the country where the lands to be charged by it lie, would probably be treated as a *brutum fulmen* (*d*). Nor will the Court adjudicate on questions

per Buckley, L.J.; and see *Phillips* v. *Batho*, (1913) 3 K. B. p. 29; 82 L. J. K. B. p. 885.

(*z*) *Emanuel* v. *Symon*, (1908) 1 K. B. 302; 77 L. J. K. B. 180.

(*a*) *Badische Anilin Fabrik* v. *Johnson & Co.*, (1897) 2 Ch. p. 345; (1898) A. C. p. 203; 66 L. J. Ch. 497; 67 L. J. Ch. 141; *Bank of Africa* v. *Cohen*, (1909) 2 Ch. p. 146; 78 L. J. Ch. p. 780.

(*b*) *The Carron Iron Co.* v. *Maclaren*, 5 H. L. C. 416, 436; 24 L. J. Ch 620; 101 R. R. 229.

(*c*) *Lord Portarlington* v. *Soulby*, 3 M. & K. p. 108; 4 L. J. (N. S.) Ch. 241; 41 R. R. 23; *Bushby* v. *Munday*, 5 Madd. 307; 21 R. R. 294; *Carron Iron Co.* v. *Maclaren*, *supra*; *Lord Cranstown* v. *Johnston*, 3 Ves. 170, 182; 5 Ves. 277; 3 R. R. 80; *Duder* v. *Amsterdamsch Trustees*, (1902) 2 Ch. 141, 142; 71 L. J. Ch. 622; *Bank of Africa* v. *Cohen*, (1909) 2 Ch. p. 146; 78 L. J. Ch. p. 780; *British South Africa Co.* v. *De Beers & Co.*, (1910) 2 Ch. p. 514; 80 L. J. Ch. 77; *Wood* v. *Connolly*, (1911) 1 Ch. 744, 745; 80 L. J. Ch. p. 416.

(*d*) *Norris* v. *Chambres*, 3 De G. F.

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relating to the title to or the right to the possession of land situate abroad (*e*), except in cases where there exists between the parties to the suit in England, a personal obligation arising out of contract, or implied contract, fiduciary relationship or fraud, or other contract, which in the view of a Court of Equity in this country, would be unconscionable; thus in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by a defendant by fraud, or other unconscionable conduct, the Court would assume jurisdiction, but where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the *locus* the claim of title set up by one party would be prefered to the claim of another party, the Court should not entertain jurisdiction to decide the matter (*f*). Moreover when a matter in dispute is being litigated in a foreign Court which has the means of deciding upon and enforcing the rights of the parties, the Court here will not, in general, interfere (*g*).

Application to Parliament.

Upon the principle that the Court acts *in personam* in granting an injunction, it appears that it has power, upon a proper case being made out, to restrain a man from applying to Parliament (*h*): but the jurisdiction will only be exercised

& J. 584; 30 L. J. Ch. 285; *Deschamps* v. *Miller*, (1908) 1 Ch. 863, 864; 77 L. J. Ch. p. 420; *Bank of Africa* v. *Cohen*, (1909) 2 Ch. pp. 146, 147; 78 L. J. Ch. p. 780; *British South Africa Co.* v. *De Beers & Co.*, (1910) 2 Ch. 514, 517; 80 L. J. Ch. 76, 77.

(*e*) *Companhia de Mocambique* v. *British South Africa Co.*, (1893) A. C. 602; 63 L. J. Q. B. 80; and see *The Black Point Syndicate* v. *Eastern Concessions Co.*, 79 L. T. 658; *Bank of Africa* v. *Cohen*, (1909) 2 Ch. p. 146; 78 L. J. Ch. p. 780; *British South Africa Co.* v. *De Beers & Co.*, *supra*, (1910) 2 Ch. p. 517; 80 L. J. Ch. p. 77.

(*f*) *Deschamps* v. *Miller*, (1908) 1 Ch. 863, 864; 77 L. J. Ch. p. 420

(*g*) *Norris* v. *Chambres*, 3 De G. F. & J. 583; 30 L. J. Ch. 285; and cf. *Fletcher* v. *Rodgers*, 27 W. R. 97; and *Hyman* v. *Helm*, 24 C. D. 531; and see *Logan* v. *Bank of Scotland*, (1906) 1 K. B. 141, 150; 75 L. J. K. B. 218, 222; and *Vardopulo* v. *Vardopulo*, (1909) 25 T. L. R. 518.

(*h*) *Ware* v. *Grand Junction Water Co.*, 2 R. & M. 470, 483; 9 L. J. (O. S.) Ch. 169, 171; 34 R. R. 136; *Heathcote* v. *North Staffordshire Railway Co.*, 2 Mac. &

under very exceptional circumstances, and it is difficult to conceive a case in which such a course could be adopted (*i*).

Application to foreign sovereign.

The Court cannot, however, restrain a man from applying for a grant to a foreign sovereign, nor, after the grant is made, can the Court prevent a man from using the grant made by the same sovereign authority. The fact that the grant so made may be inconsistent with a grant previously made by the same sovereign authority does not give a man any equity to apply to the Court (*k*).

Injunction does not run with the land.

An injunction being an order directed to a person, it does not run with the land (*l*).

Injunctions to restrain actions at law abolished.

Under the former procedure, the Court of Chancery had jurisdiction to restrain by injunction an action at law in all cases where the defendant to the action could show that he had a good equitable defence. But this jurisdiction has been abolished by the Judicature Act, 1873. It is there declared that no cause or proceeding, at any time pending in the High Court of Justice or before the Court of Appeal, shall be restrained by prohibition or injunction, but that every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto (*m*).

Although the Court has no power to restrain a pending action, an injunction may be granted to restrain the institution of proceedings in the High Court of Justice (*n*)

G. 109; 86 R. R. 25; *Stockton and Hartlepool Railway Co.* v. *Leeds and Thirsk Railway Co.*, 2 Ph. 666, 670.

(*i*) Ib.; *Steele* v. *North Metropolitan Railway Co.*, 2 Ch. 237, 240, 36 L. J. Ch. 540.

(*k*) *Gladstone* v. *Ottoman Bank*, 1 H. & M. 505; 32 L. J. Ch. 228.

(*l*) *Att.-Gen.* v. *Birmingham, etc., Drainage Board*, 17 C. D. 685, 692; 50 L. J. Ch. 786, 787; and see *Att.-Gen.* v. *Dorking*, 20 C. D. 595; 51 L. J. Ch. 585.

(*m*) 36 & 37 Vict. c. 66, s. 24 sub-s. 5; see *Garbutt* v. *Faucus*, 1 Ch. D. 155; 45 L. J. Ch. 133; *The James Westoll*, (1905) P. p. 51; 74 L. J. P. p. 11.

(*n*) *Besant* v. *Wood*, 12 C. D. 605; *Hart* v. *Hart*, 18 C. D. 670, 680; 50 L. J. Ch. 697; and see *Cercle Restaurant, etc., Co.* v. *Lavery*, 18 C. D. 555; 50 L. J. Ch. 837; and *In re A Company*, (1894) 2 Ch. 349; see *In re Maidstone Palace of Varieties*, (1908) 2 Ch. p. 286; 78 L. J. Ch. p. 740; and *post*, Chap. XX.

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Prerogative of Crown not affected by the Judicature Acts.

The prerogative of the Crown to intervene in actions affecting the right and revenue of the Sovereign has not been affected by the Judicature Acts (*o*); and the proper tribunal for the determination of such matters is the Revenue side of the King's Bench Division of the High Court of Justice (*p*).

Jurisdiction of County Court by injunction.

A County Court has under the Judicature Act, 1873, s. 89, in actions within its jurisdiction, power to grant an injunction (*q*), whether interlocutory or perpetual (*r*), including actions in which an injunction only is claimed, provided the case is one in which, if damages had been claimed, the amount would have been within the jurisdiction of a County Court (*s*). Obedience to the order can be enforced by committal (*t*). The County Court has no jurisdiction to restrain the infringement of a patent if its validity is disputed (*u*), nor to restrain the infringement of a registered trade mark (*x*), and it has been doubted whether the County Court can grant an injunction to restrain a threatened injury where no damage has been sustained (*y*). Where the only question before the Court is whether an injunction shall be granted or not, an appeal lies without leave, notwithstanding the provisions of section 120 of the County Courts Act, 1888 (*z*).

It has been held that section 116, sub-sect. 2 of the County Courts Act, 1888, which deprives a plaintiff of costs who brings an action founded on tort in the High Court and

(*o*) *Att.-Gen.* v. *Constable*, 4 Exch. D. 172; 48 L. J. Ex. 455; *Stanley of Alderley* (*Lord*) v. *Wild and Son*, (1900) 1 Q. B. 257; 69 L. J. Q. B. 318; and see *Ulmann* v. *Cowes Harbour Commissioners*, (1909) 2 K. B. 1; 78 L. J. K. B. 877.

(*p*) *Stanley of Alderley* (*Lord*) v. *Wild and Son*, *supra*.

(*q*) See *Keates* v. *Woodward*, (1902) 1. K. B. p. 538; 71 L. J. K. B. p. 329; *Stiles* v. *Ecclestone*, (1903) 1 K. B. 544; 72 L. J. K. B. 256; see also County Court Rules 1903—1912, Order XII., rules 6, 11; Order XXII., rule 16.

(*r*) *Richards* v. *Culherne*, 7 Q. B. D. 623; see County Court Rules, 1903—1912, Order XII., r. 6; Order XXII., r. 16.

(*s*) *Stiles* v. *Ecclestone*, (1903), 1 K. B. 544; 72 L. J. K. B. 256.

(*t*) *Martin* v. *Banister*, 4 Q. B. D. 491; 48 L. J. Q. B. 677.

(*u*) *Reg.* v. *Halifax County Court Judge*, (1891) 2 Q. B. 263; 60 L. J. Q. B. 550; *Bow* v. *Hart*, (1905) 1 K. B. p. 598; 74 L. J. K. B. p. 342.

(*x*) *Bow* v. *Hart*, *supra*.

(*y*) *Martin* v. *Banister*, *supra*.

(*z*) *Brune* v. *James*, (1898) 1 Q. B. 417; 67 L. J. Q. B. 283.

recovers less than 10*l.* damages, does not apply where the main relief sought is an injunction (*a*).

Injunction against repetition of wrongful act or breach of contract.

In any cause or matter in which an injunction has been or might have been granted, the plaintiff may before or after judgment apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury or breach of contract of a like kind relating to the same property or right, or arising out of the same contract, and the Court or a judge may grant the injunction either upon or without terms as may be just (*b*).

(*a*) *Keates* v. *Woodward*, (1902) 1 K. B. 532; 71 L. J. K. B. 325; *Du Pasquier* v. *Cadbury & Co.*, (1903) 1 K. B. 108; 72 L. J. K. B. p. 81; and see *Doherty* v. *Thompson*, (1906) 94 L. T. 626. As to costs where a plaintiff failed on his claim for an injunction, and recovered under 10*l.* on his alternative claim for compensation, see *Clinton* v. *Bennett*, (1908) 1 K. B. 109; 77 L. J. K. B. 52.

(*b*) Order L., r. 12.

CHAPTER III.

INJUNCTIONS AGAINST THE VIOLATION OF COMMON LAW RIGHTS.

SECTION 1.—THE PROTECTION OF LEGAL RIGHTS TO PROPERTY PENDING LITIGATION.

Protection of legal rights pending litigation.

THE jurisdiction of the High Court of Justice by injunction is not confined to the protection of equitable rights, but extends to the protection of legal rights to property from damage pending litigation. The protection of legal rights to property from irreparable or at least from serious damage pending the trial of the legal right was part of the original and proper office of the Court of Chancery (*a*). In exercising the jurisdiction the Court does not pretend to determine legal rights to property, but merely keeps the property in its actual condition until the legal title can be established (*b*). The Court interferes on the assumption that the party who seeks its interference has the legal right which he asserts, but needs the aid of the Court for the protection of the property in question until the legal right can be ascertained (*c*). The office of the Court to interfere being founded on the existence of the legal right, a man who seeks the aid of the Court must he able to show a fair *primâ facie* case in support of the title which he asserts (*d*). He is not required to make out a clear legal title, but he must satisfy the Court that he has a fair question

(*a*) *Hilton* v. *Lord Granville*, Cr. & Ph. 283, 292; 10 L. J. Ch. 398; 54 R. R. 297.

(*b*) *Harman* v. *Jones*, Cr. & Ph. 292, 301; *Black Point Syndicate* v. *Eastern Concessions Co.*, 79 L. T. p. 662; *Leney & Co.* v. *Callingham and Thompson*, (1908) 1 K. B. 84, 85; 77 L. J. K. B. p. 67; *Jones* v. *Pacaya Rubber, etc., Co.*, (1911) 1 K. B. p. 457; 80 L. J. K. B. p. 156.

(*c*) Ib.

(*d*) *Saunders* v. *Smith*, 3 M. & C. 714, 728; 7 L. J. (N. S.) Ch. 227; 45 R. R. 367; *Hilton* v. *Lord Granville*, Cr. & Ph. 283, 292; 10 L. J. Ch. 398; 54 R. R. 297; *Leney & Co.* v. *Callingham and Thompson*, *supra*.

to raise as to the existence of the legal right which he sets up (*e*), and that there are substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent (*f*). The Court must, before disturbing any man's legal right, or stripping him of any of the rights with which the law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit (*g*). The mere existence of a doubt as to the plaintiff's right to the property, interference with which he seeks to restrain, does not of itself constitute a sufficient ground for refusing an injunction, though it is always a circumstance which calls for the attention of the Court (*h*). Where the question of right had been decided in the plaintiff's favour in a Court of law, the fact that an appeal was pending was held to be no ground for a Court of equity refusing an injunction, unless the Court doubted the correctness of the decision at law (*i*). But the pendency of the appeal might be a ground for the Court postponing the operation of the injunction (*k*).

A case of actual or threatened violation of the right should be made out.

If the legal right is not disputed, a man who seeks the aid of the Court must be able to show that the act complained of is in fact a violation of the right, or is at least an act which, if carried into effect, will necessarily result in a violation of the right (*l*). The mere prospect or apprehension of injury or

(*e*) *Shrewsbury and Chester Railway Co.* v. *Shrewsbury and Birmingham Railway Co.*, 1 Sim. N. S. 410, 426; 20 L. J. Ch. 574; 89 R. R. 143.

(*f*) *Sparrow* v. *Oxford, Worcester, and Wolverhampton Railway Co.*, 9 Ha. 436, 441; 2 De G. M. & G. 94; 21 L. J. Ch. 731; 95 R. R. 21.

(*g*) *Att.-Gen.* v. *Mayor of Wigan*, 5 De G. M. & G. 52; 101 R. R. 600.

(*h*) *Ollendorf* v. *Black*, 4 De G. & S. 211; 20 L. J. Ch. 165; 87 R. R. 353.

(*i*) *Att.-Gen.* v. *Proprietors of Bradford Canal*, L. R. 2 Eq. 71.

(*k*) L. R. 2 Eq. pp. 79, 84; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 2 Ch. 388; 64 L. J. Ch. 736; *Att.-Gen.* v. *Birmingham, Tame, etc., Drainage Board*, (1908) 2 Ch. 563; on appeal, (1910) 1 Ch. 48, 62; 79 L. J. Ch. 137; (1912) A. C. 788; 82 L. J. Ch. 45.

(*l*) *Earl of Ripon* v. *Hobart*, 3 M. & K. 169, 176; 3 L. J. (N. S.) Ch. 145; 41 R. R. 40; *Haines* v. *Taylor*, 10 Beav. 75; 2 Ph. 209; 78 R. R. 71; *Pattison* v. *Gilford*, 18 Eq. 259; 43 L. J. Ch. 524; *Goodhart* v. *Hyett*, 25 C. D. 190; 50 L. T. 95; *Fletcher* v. *Bealey*, 28 C. D. 688; 54 L. J. Ch. 424; *Fielden* v. *Cox*, (1906) 22 T. L. R. 411; see *Fraser* v. *Fear*, (1912) 107 L. T. 423; 57 S. J. 29.

the mere belief that the act complained of may or will be done, is not sufficient (*m*); but if an intention to do the act complained of can be shown to exist, or if a man insists on his right to do, or begins to do, or threatens to do, or gives notice of his intention to do an act which must, in the opinion of the Court, if completed, give a ground of action, there is a foundation for the exercise of the jurisdiction (*n*). The mere denial by a man of his intention to do an act or to infringe a right will not prevent the Court from interfering (*o*); but if a man who claims a right to do a certain act asserts positively that before proceeding to do the act, he will give reasonable notice of his intention to do it, and there is no reason to doubt the truth of his assurance, the Court will not interfere (*p*).

Restraining following trade.

The Court should not grant an interlocutory injunction on a *primâ facie* case, restraining a defendant from following his trade or profession, if it is clear that such an order will prevent the defendant from earning his livelihood (*q*).

Irreparable damage.

A man who seeks the aid of the Court by way of interlocutory injunction, must, as a rule (*r*), be able to satisfy the

(*m*) *Earl of Ripon* v. *Hobart*, 3 M. & K. 174; 3 L. J. (N. S.) Ch. 145; 41 R. R. 40; *Haines* v. *Taylor*, 10 Beav. 75; 2 Ph. 209; 78 R. R. 71; *Att.-Gen.* v. *Corporation of Manchester*, (1893) 2 Ch. 87, 91; 62 L. J. Ch. 45; *Att.-Gen.* v. *Rathmines and Pembroke Hospital Board*, (1904) 1 I. R. 161, and *Att.-Gen.* v. *Nottingham Corporation*, (1904) 1 Ch. 673, 677; 73 L. J. Ch. p. 514, where the principles on which the Court proceeds in granting or refusing injunctions *quia timet* are discussed; *Att.-Gen.* v. *Dorin*, (1912) 1 Ch. p. 378; 81 L. J. Ch. p. 235.

(*n*) *Att.-Gen.* v. *Forbes*, 2 M. & C. p. 132; 45 R. R. 15; *Tipping* v. *Eckersley*, 2 K. & J. 264, 270; 110 R. R. 216; *Hext* v. *Gill*, 7 Ch. 699, 711; 41 L. J. Ch. 761; *Cooper* v. *Whittingham*, 15 C. D. 501; 49 L. J. Ch. 752; *Shafto* v. *Bolckow & Co.*, 34 C. D. 729; 35 W. R. 562; *Phillips* v. *Thomas*, 62 L. T. 793; *Leckhampton Quarries Co.* v. *Ballinger and Cheltenham Rural District Council*, (1904) 20 T. L. R. 509 (affirmed on appeal on question of costs, 21 T. L. R. 632); *Carlton Illustrators* v. *Coleman & Co.*, (1911) 1 K. B. at p. 783; 80 L. J. K. B. p. 515; *Dickens* v. *National Telephone Co.*, (1911) 75 J. P. 557; *Thornhill* v. *Weeks*, (1913) 1 Ch. 438, 444; 82 L. J. Ch. 299.

(*o*) *Jackson* v. *Cator*, 5 Ves. 688; 5 R. R. 144; *Potts* v. *Levy*, 2 Drew. 272, 279; 100 R. R. 131; *Adair* v. *Young*, 12 C. D. 19.

(*p*) *Lord Cowley* v *Byas*, 5 C. D. 950.

(*q*) *Palace Theatre Co.* v. *Clensy*, (1909) 26 T. L. R. 28, *per* Vaughan Williams, L.J. In this case the injunction was granted, the plaintiff having undertaken to apply for an immediate trial.

(*r*) As to cases where an injunc-

Court that its interference is necessary to protect him from that species of injury which the Court calls irreparable, before the legal right can be established upon trial (*s*). By the term "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury; all that is meant is, that the injury would be a material one, and one which could not be adequately remedied by damages (*t*); and by the term "the inadequacy of the remedy by damages" is meant that the remedy by damages is not such a compensation as will in effect, though not *in specie*, place the parties in the position in which they formerly stood (*u*). If the act complained of threatens to destroy the subject-matter in question, the case may come within the principle, even though the damages may be capable of being accurately measured (*x*). The fact that the amount of damage cannot be accurately ascertained may constitute irreparable damage (*y*); but although the amount of damage may be difficult to ascertain, a man who has on a previous occasion compromised his rights against other parties by accepting a sum of money, may preclude himself from saying that the damage is irreparable and cannot be compensated by money (*z*). It is, however, no objection to

tion is claimed against the breach of a negative covenant, see *Doherty* v. *Allman*, 3 A. C. 719, 720; *McEacharn* v. *Colton*, (1902) A. C. p. 107; 71 L. J. P. C. p. 21; *Formby* v. *Barker*, (1903) 2 Ch. p. 554; 72 L. J. Ch. 721; *Elliston* v. *Reacher*, (1908) 2 Ch. p. 395; 79 L. J. Ch. p. 628; *Att.-Gen.* v. *Walthamstow Urban Council*, (1910) 1 Ch. p. 351; 79 L. J. Ch. p. 269; *post*, Chap. X.

(*s*) *Duke* v. *Taylor*, 3 De G. F. & J. 467; 30 L. J. Ch. 281; *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. 304; 22 L. J. Ch. 811; 98 R. R. 151; *Johnson* v. *Shrewsbury and Birmingham Railway Co.*, 3 De G. M. & G. p. 931; 22 L. J. Ch. 921; 98 R. R. 960; *Lumley* v. *Wagner*, 1 De G. M. & G. p. 613; 21 L. J. Ch. 898; 91 R. R. 193.

(*t*) *Pinchin* v. *London and Blackwall Railway Co.*, 5 De G. M. & G. p. 860; 24 L. J. Ch. 419; *East Lancashire Railway Co.* v. *Hattersley*, 8 Ha. p. 90; 85 R. R. 215; *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. 304, 320; 22 L. J. Ch. 811, 813; *Bloxam* v. *Metropolitan Railway*, 3 Ch. p. 354; *Jordeson* v. *Sutton, etc., Gas Co.*, (1899) 2 Ch. 237, 238; 68 L. J. Ch. 457, 475.

(*u*) *Wood* v. *Sutcliffe*, 2 Sim. N. S. p. 165; 21 L. J. Ch. 253; 89 R. R. 262.

(*x*) *Hilton* v. *Lord Granville*, Cr. & Ph. 283, 292; 10 L. J. Ch. 398; 54 R. R. 297.

(*y*) *Cory* v. *Yarmouth and Norwich Railway Co.*, 3 Ha. 603; 64 R. R. 435.

(*z*) *Wood* v. *Sutcliffe*, 2 Sim. N. S. 168, 169; 21 L. J. Ch. 253; 89

the exercise of the jurisdiction by injunction that a man may have a legal remedy. The question in all cases is, whether the remedy by damages is, under the circumstances of the case, full and complete (*a*). "A person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf" (*b*).

Conduct of the party who seeks the aid of the Court must be fair and honest.

The jurisdiction of the Court to interfere by way of interlocutory injunction in support of a legal title being purely equitable, it is governed upon strict equitable principles. The Court, where its summary interference is invoked, always looks to the conduct of the party who makes the application, and will refuse to interfere, even in cases where it acknowledges a right, unless his conduct in the matter has been fair and honest, and free from any taint of fraud or illegality (*c*).

Acquiescence.

Parties who, possessing full knowledge of their rights, have

R. R. 262; *Dowling* v. *Betjeman*, 2 J. & H. p. 544; *Ormerod* v. *Todmorden, etc., Mill Co.*, 11 Q. B. D. 162. But see *Ainsworth* v. *Bentley*, 14 W. R. 630, 632.

(*a*) See *Lumley* v. *Wagner*, 1 De G. M. & G. 604, 616; 21 L. J. Ch. 898, 900; 91 R. R. 193; and *Ryan* v. *Mutual Tontine Westminster Chambers Association*, (1893) 1 Ch. p. 128; 62 L. J. Ch. 256; *Martin* v. *Price*, (1894) 1 Ch. 276; 63 L. J. Ch. 209; *Shelfer* v. *City of London Electric Light Co.*, (1895) 1 Ch. 287; 64 L. J. Ch. 216, 224; *Jordeson* v. *Sutton, etc., Gas Co.*, (1899) 2 Ch. 237, 238; 68 L. J. Ch. 457; *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 193; 73 L. J. Ch. p. 493; and see *English* v. *Metropolitan Water Board*, (1907) 1 K. B. p. 603; 76 L. J. K. B. p. 371; *Riley* v. *Halifax Corporation*, (1907) 97 L. T. 278; 23 T. L. R. 613; *Jones* v. *Tankerville* (*Earl*), (1909) 2 Ch. p. 446; 78 L. J. Ch. p. 761. As to breach of negative covenants, see *supra*, p. 18, note (*r*), and Chap. X.

(*b*) *Per* Smith, L.J., in *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. p. 322; 64 L. J. Ch. p. 224; *Allport* v. *The Securities Co.*, 72 L. T. 533; *Cowper* v. *Laidler*, (1903) 2 Ch. p. 341; 72 L. J. Ch. 578; *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 193; 73 L. J. Ch. p. 493; *Saunby* v. *London* (*Out*) *Commissioners*, (1906) A. C. 110, 115, 116; 75 L. J. P. C. p. 27; *Gilling* v. *Gray*, (1910) 27 T. L. R. 39.

(*c*) *Blakemore* v. *Glamorganshire Railway Co.*, 1 M. & K. p. 168; 2 L. J. (N. S.) 95; 36 R. R. 289; *Great Western Railway Co.* v. *Oxford, Worcester, and Wolverhampton Railway Co.*, 3 De G. M. & G. p. 359; 98 R. R. 175; *Williams* v. *Roberts*, 8 Ha. 326, 327; *Jarvis* v. *Islington Borough Council*, (1909) 73 J. P. Jo. 323.

lain by, and by their conduct have encouraged others to expend moneys or alter their condition in contravention of the rights for which they contend, cannot call upon the Court for its summary interference (*d*). Acquiescence by one of several co-plaintiffs in the act complained of precludes the interference of the Court by injunction; and the rule is the same although some of the plaintiffs are infants (*e*). The principle applies with peculiar force where the property on which the moneys are expended is mineral property (*f*), or property of a speculative character (*g*), or if the act complained of is caused by a public company in the execution and construction of their works (*h*). As the injury to a company in being stayed (if it shall ultimately turn out that they are acting lawfully) is great in proportion to the magnitude of their operations, the Court will in general hold even slight acquiescence on the part of the complainant a bar to relief (*i*). The extent of the expenditure is to a certain degree the measure of the acquiescence (*j*).

In order to justify the application of the principle, it must clearly appear that the party against whom acquiescence is alleged was aware of his rights, and by his conduct encouraged the other party to alter his condition, and that the latter acted upon the faith of the encouragement so held out (*k*). There

(*d*) *Great Western Railway Co.* v. *Oxford, Worcester, and Wolverhampton Railway Co.*, 3 De G. M. & G. p. 359; 98 R. R. 175; *Rochdale Canal Co.* v. *King*, 2 Sim. N. S. 78; 16 Beav. 630; 20 L. J. Ch. 675; 89 R. R. 211; see *Leeds (Duke of)* v. *Amherst*, 2 Ph. 123; 15 L. J. Ch. 376; 78 R. R. 94; *Davies* v. *Sear*, L. R. 7 Eq. 427; *Willmott* v. *Barber*, 15 C. D. 105, 106; *Russell* v. *Watts*, 25 C. D. 576; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129, 140; *Civil Service Musical Instrument Association* v. *Whiteman*, (1899) 68 L. J. Ch. 484.

(*e*) *Marker* v. *Marker*, 9 Ha. 1, 15 20 L. J. Ch. 246, 251; 89 R. R. 305;

(*f*) *Clegg* v. *Edmondson*, 8 De G. M. & G. 787; 26 L. J. Ch. 673; *Ernest* v. *Vivian*, 33 L. J. Ch. 513.

(*g*) See *Crossley* v. *Derby Gas Light Co.*, Webst. P. C. 120; *Neilson* v. *Thompson*, ib., 275.

(*h*) *Att.-Gen.* v. *Grand Junction Canal Co.*, (1909) 2 Ch. 510, 518; 78 L. J. Ch. 681, 684.

(*i*) *Greenhalgh* v. *Manchester and Birmingham Railway Co.*, 3 M. & C. 784; 8 L. J. (N. S.) Ch. 75; 45 R. R. 393.

(*j*) *Great Western Railway Co.* v. *Oxford, Worcester, etc., Railway Co.*, 3 De G. M. & G. 341, 361; 98 R. R. 175.

(*k*) *Marker* v. *Marker*, 9 Ha. p. 16; 20 L. J. Ch. 251; 89 R. R. 305; *Greenhalgh* v. *Manchester and Birmingham Railway Co.*, 3 M. & C.

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is no acquiescence if an act has been permitted, or expenditure has been allowed to be made under an erroneous opinion and view, and in ignorance of the consequences or the real facts (*l*).

The acquiescence of an agent, when acting within the scope of his authority, is binding on the principal; but in order that it should be binding the agent must be acting within the scope of his authority (*m*). A corporation or company may be bound by acquiescence as well as an individual (*n*).

The conduct and dealings of a man with others than the party with whom the contest exists may constitute a case of acquiescence, so as to preclude him from coming to the Court for relief against a state of things to which his own conduct has led (*o*). Where, accordingly, the owners of a canal had permitted several persons to supply their mills with water for several purposes, the Court would not restrain a man who had been allowed to lay down pipes to the canal from using the water in the same way as his neighbours (*p*).

Acquiescence.

The mere objection to, or a mere protest on the part of the plaintiff against, the act of the defendant, or a mere threat to take legal proceedings, is not in general sufficient to exclude the consequences of laches or acquiescence (*q*). Nor will the continual assertion of a claim, unaccompanied by any act to give effect to it, keep alive a right which would be otherwise

791; 8 L. J. (N. S.) Ch. 75; 45 R. R. 393; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Willmott* v. *Barber*, 15 C. D. 105; *Russell* v. *Watts*, 25 C. D. p. 576; *Civil Service Musical Instruments Association* v. *Whitman*, (1899) 68 L. J. Ch. 484; and see *Elliston* v. *Reacher*, (1908) 2 Ch. 374, 392; 77 L. J. Ch. p. 617; *Piggott* v. *Middlesex County Council*, (1909) 1 Ch. 134, 148; 77 L. J. Ch. 820.

(*l*) *Bankart* v. *Houghton*, 27 Beav. 425, 431; 28 L. J. Ch. 473; 122 R. R. 471; *Tubbs* v. *Esser*, (1910) 26 T. L. R. 146.

(*m*) See *Att.-Gen.* v. *Briggs*, 1 Jur. N. S. 1084; *Miles* v. *Tobin*, 16 W. R. 465; *Gordon* v. *Cheltenham Railway Co.*, 5 Beav. 238.

(*n*) *Laird* v. *Birkenhead Railway Co.*, John. 500; 29 L. J. Ch. 218; 123 R. R. 206; *Hill* v. *South Staffordshire Railway Co.*, 11 Jur. N. S. 192.

(*o*) *Rundell* v. *Murray*, Jac. p. 316; 23 R. R. 75; *Saunders* v. *Smith*, 3 M. & C. 711, 730; 7 L. J. (N. S.) Ch. 227; 45 R. R. 367.

(*p*) *Rochdale Canal Co.* v. *King*, 2 Sim. N. S. 78; 20 L. J. Ch. 675; 89 R. R. 211.

(*q*) *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515; 11 R. R. 245; *Wicks* v. *Hunt*, John. 372; 123 R. R. 157.

precluded (*r*). But if moneys are expended after full and distinct notice that the work is objected to, and that steps will be taken to prevent it (*s*), or with full knowledge of the true condition of the title (*t*); or if the acquiescence is satisfactorily accounted for and explained (*u*), as, for instance, that it has taken place upon the faith of a representation that no grievance would result from or be produced by the act (*v*), or upon the faith that negotiations were going on between the parties with a view to the settlement of the dispute on points in contest between them (*x*); or if the party against whom acquiescence is alleged was justified in assuming that his rights would not be affected (*y*); or if the delay is while the acts done are preliminary to the acts against which he claims relief, and not such acts themselves (*z*); the consequences of acquiescence are excluded. Nor will a man be precluded from relief on the ground of acquiescence in what he was led to consider a mere temporary violation of his right (*a*). Nor does the acquiescence in a state of things which produces little injury warrant the subsequent extension of them to an extent productive of serious damage (*b*).

(*r*) *Clegg* v. *Edmondson*, 8 De G. M. & G. 787; 26 L. J. Ch. 246; 114 R. R. 279; *Lehmann* v. *Macarthur*, 3 Ch. 496.

(*s*) *Att.-Gen.* v. *Sheffield Gas Co.*, 3 D. M. & G. 304, 328; 22 L. J. Ch. 811; 98 R. R. 151; *Rochdale Canal Co.* v. *King*, 16 Beav. p. 643; 22 L. J. Ch. 604; 96 R. R. 288; *Lord Manners* v. *Johnson*, 1 C. D. 679; 45 L. J. Ch. 404.

(*t*) *Rennie* v. *Young*, 2 De G. & J. 136, 142; 119 R. R. 56; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Proctor* v. *Bennis*, 36 C. D. p. 760; 57 L. J. Ch. p. 22.

(*u*) *Goldsmid* v. *Tunbridge Wells Commissioners*, 1 Ch. 349, 355; 35 L. J. Ch. 382; *Att.-Gen.* v. *Corporation of Halifax*, 17 W. R. 1088; *Coles* v. *Simms*, 5 De G. M. & G. 1; 23 L. J. Ch. 258; 104 R. R. 1; see *Elliston* v. *Reacher*, (1908) 2 Ch. 374, 392; 77 L. J. Ch. 617, 628.

(*v*) *Davies* v. *Marshall*, 10 C. B. N. S. 711; 31 L. J. C. P. 64.

(*x*) *Innocent* v. *Midland Railway Co.*, 1 Ra. Ca. 242, 256.

(*y*) *Att.-Gen.* v. *Leeds Corporation*, 5 Ch. p. 594; 39 L. J. Ch. 711; *Smith* v. *Smith*, 20 Eq. p. 503; 44 L. J. Ch. 630; see *Piggott* v. *Middlesex County Council*, (1909) 1 Ch. p. 148; 77 L. J. Ch. p. 820.

(*z*) *Northam Bridge and Roads Co.* v. *London and South Western Railway Co.*, 9 L. J. Ch. 277; 1 Ra. Ca. 653.

(*a*) *Gordon* v. *Cheltenham Railway Co.*, 5 Beav. 229, 238; 59 R. R. 486; *Att.-Gen.* v. *Luton Board of Health*, 2 Jur. N. S. 182; *Att.-Gen.* v. *Borough of Birmingham*, 4 K. & J. 546; 116 R. R. 445.

(*b*) *Bankart* v. *Houghton*, 27 Beav.

Acquiescence.

A less strong degree of acquiescence is sufficient to disentitle a party to an interlocutory injunction than is required to debar him from relief at the hearing of the cause. In dismissing a bill upon interlocutory application, the Court does not conclude a right, but merely refuses, in the exercise of its discretion, to interfere summarily in favour of a party who has not shown due diligence in making the application (*c*). "A short acquiescence," said Lord Langdale, in *Gordon* v. *Cheltenham Railway Company* (*d*), "may properly induce the Court not to interfere *ex parte*. A longer acquiescence may, under the circumstances, throw serious doubt upon the right of the plaintiff, and induce the Court not to interfere by interlocutory order even when applied for on notice. But when acquiescence is used as an argument in support of a demurrer, there must, to make it effective, be such an acquiescence as wholly to disentitle the plaintiff to any relief. It must be assumed that the plaintiff had originally a right, but that he has altogether deprived himself of it by acquiescence."

A man may by his acquiescence preclude himself not only from coming to the Court for an injunction, but from obtaining damages (*e*).

Delay.

Delay, though it may not amount to proof of acquiescence, may be sufficient to disentitle a man to the summary interference of the Court by interlocutory injunction (*f*). But delay in taking proceedings is not so material whilst matters

125; 28 L. J. Ch. 473; *Western* v. *M'Dermott*, 2 Ch. 72; 35 L. J. Ch. 190; *Att.-Gen.* v. *Corporation of Halifax*, 17 W. R. 1088; and see *Knight* v. *Simmonds*, (1896) 1 Ch. 653; (1896) 2 Ch. 294; 65 L. J. Ch. 583; *Osborne* v. *Bradley*, (1903) 2 Ch. 446, 457; 73 L. J. Ch. 49, 51.

(*c*) *Johnson* v. *Wyatt*, 2 De G. J. & S. 18, 25; 33 L. J. Ch. 394; *Child* v. *Douglas*, 5 De G. M. & G. 739, 741; 104 R. R. 262.

(*d*) 5 Beav. 233; 59 R. R. 486.

(*e*) *Kelsey* v. *Dodd*, 52 L. J. Ch. 34; *Sayers* v. *Collyer*, 28 C. D. 103; 54 L. J. Ch. 1

(*f*) *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. 304; 22 L. J. Ch. 811; 98 R. R. 151; *Great Western Railway Co.* v. *Oxford, Worcester, etc., Railway Co.*, 3 De G. M. & G. 311; 98 R. R. 175; *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 212, 230; 28 L. J. Ch. 153; 121 R. R. 80; *Gaunt* v. *Fynney*, 8 Ch. 8; 42 L. J. Ch. 122; *Att.-Gen.* v. *South Staffordshire Waterworks*, (1909) 25 T. L. R. 408.

remain *in statu quo* (*g*). Moreover, it seems that mere delay is not material where an injunction is sought in aid of a legal right, and that accordingly mere lapse of time will not be a bar to the granting of an injunction at the trial, unless it would be a bar to the legal right (*h*). "Mere acquiescence," said Lord Cranworth, in *Rochdale Canal Co.* v. *King* (*i*), "(if by acquiescence is to be understood only the abstaining from legal proceedings) is unimportant. Where one party invades the right of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive, unless indeed he continues inactive so long as to bring the case within the Statute of Limitations" (*k*).

Actions by the Attorney-General.

Delay is a circumstance which may be taken into consideration by the Court in determining whether to grant an injunction, on an application by the Attorney-General on behalf of the public (*l*).

Course of the Court in dealing with the application.

The Court, upon the application for an *interlocutory injunction* in support of a legal right, will deal with the injunction upon the evidence before it, and will confine itself strictly to the immediate object sought, and as far as possible abstain from prejudging the question in the cause (*m*). If a fair *primâ facie* case be made out, and the case is free from objec-

(*g*) *Gale* v. *Abbott*, 8 Jur. N. S. 988, 989; *Archbold* v. *Scully*, 9 H. L. C. p. 388.

(*h*) *Fullwood* v. *Fullwood*, 9 C. D. 176; 47 L. J. Ch. 459; *Archbold* v. *Scully*, 9 H. L. C. 383; *Rowland* v. *Mitchell*, 75 L. T. 65; *Hogg* v. *Scott*, 18 Eq. 444; see *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 311; 80 L. J. Ch. p. 154.

(*i*) 2 Sim. N. S. 89; 22 L. J. Ch. 604, 606; 43 L. J. Ch. 705.

(*k*) *London, Chatham and Dover Railway Co.* v. *Bull*, 47 L. T. 416; *Duke of Northumberland* v. *Bowman*, 56 L. T. 773; *Archbold* v. *Scully*, *supra*.

(*l*) *Att.-Gen.* v. *Wimbledon House Estate Co.*, (1904) 2 Ch. p. 42; 73 L. J. Ch. p. 595; *Att.-Gen.* v. *Scott*, (1905) 2 K. B. p. 169; 74 L. J. K. B. 803; *Att.-Gen.* v. *Metcalf and Greig*, (1907) 2 Ch. pp. 34, 35; 76 L. J. Ch. 259; (reversed on appeal on another point, (1908) 1 Ch. 327; 77 L. J. Ch. 261); *Att.-Gen.* v. *Grand Junction Canal Co.*, (1909) 2 Ch. p. 518; 78 L. J. Ch. 681; *Att.-Gen.* v. *South Staffordshire Waterworks Co.*, (1909) 25 T. L. R. 408; *Att.-Gen.* v. *Birmingham, Tame, etc., Drainage Board*, (1910) 1 Ch. p. 53; 79 L. J. Ch. p. 137; (1912) A. C. 788, 812; 82 L. J. Ch. 45. See *Att.-Gen.* v. *South Staffordshire Waterworks Co.*, *supra*, as to delay in cases of *ultra vires*.

(*m*) *Skinners' Co.* v. *Irish Society*, 1 M. & C. 162, 164; 64 R. R. 166; *Woodbridge* v. *Bellamy*, (1911) 1 Ch. p. 338; 80 L. J. Ch. p. 272.

tions of an equitable consideration, several courses are open to the Court (*n*). Which of these courses will be adopted is always a matter for the discretion of the Court, but, in the absence of special circumstances, the leading principle which is the rule of the Court and limits its discretion is, that only such a restraint shall be imposed as may stop the mischief complained of, and keep the property in its actual condition until the hearing (*o*). If the case, as made out, is plain and free from doubt, the Court would, even before the Judicature Acts, in the exercise of its discretion, determine the question, and grant an injunction without putting the parties to the expense and delay of requiring the plaintiff to establish his title at law (*p*); but the case had to be very clear for the Court to adopt this course (*q*). If the defendant disputed the legal title of the plaintiff or denied the fact of its violation, the Court would seldom, however clear the case might in its opinion be, grant an injunction without putting the plaintiff to establish his legal right (*r*).

In doubtful cases where the question as to the legal right is one on which the Court is not prepared to pass an opinion, or the legal right being admitted the fact of its violation is denied, the course of the Court is either to grant the injunction pending the trial of the legal right, or to order the motion to stand over until the legal right has been tried (*s*). In determining which of these two alternatives

(*n*) *Bacon* v. *Jones*, 4 M. & C. 436, 437: 48 R. R. 143.

(*o*) *Blakemore* v. *Glamorganshire Railway Co.*, 1 M. & K. 154; 2 L. J. (N. S.) Ch. 95; 36 R. R. 289; *Leney & Co.* v. *Callingham and Thompson*, (1908) 1 K. B. p. 84; 77 L. J. K. B. p. 67; *Jones* v. *Pacaya Rubber Co.*, (1911) 1 K. B. p. 458; 80 L. J. K. B. p. 156.

(*p*) *Bacon* v. *Jones*, *supra*; *Potts* v. *Levy*, 2 Drew. 272; 100 R. R. 131; *Gravely* v. *Barnard*, 18 Eq. 518, 523; 43 L. J. Ch. 659.

(*q*) *Motley* v. *Downman*, 3 M. & C. p. 17; 6 L. J. (N. S.) Ch. 308; 45 R. R. 195; *Eaden* v. *Firth*, 1 H. & M. 573.

(*r*) *Bacon* v. *Jones*, 4 M. & C. 433; 48 R. R. 143; *Norton* v. *Nicholls*, 4 K. & J. 475, 478; 116 R. R. 415; *Mayor of Cardiff* v. *Cardiff Waterworks Co.*, 4 De G. & J. 596; 124 R. R. 409; *Harman* v. *Jones*, Cr. & Ph. 301.

(*s*) *Bramwell* v. *Halcomb*, 3 M. & C. 737, 739; 45 R. R. 378; *Earl of Ripon* v. *Hobart*, 3 M. & K. 169; 3 L. J. (N. S.) Ch. 145; 41 R. R. 40; *Imperial Gas Co.* v. *Broadbent*, 7 H. L. C. p. 612; 29 L. J. Ch. 377; 115 R. R. 295.

Balance of convenience.

it shall adopt, the Court is governed by the consideration as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction (*t*), and will take care so to frame its order as not to deprive either party of the benefit he is entitled to, if in the event it turns out that the party in whose favour the order is made shall be in the wrong (*u*). In doubtful cases, if it appears, upon the balance of convenience and inconvenience, that greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it in the event of the legal right proving to be in his favour, the injunction will not be granted, but the motion will be ordered to stand over until the hearing. If, on the other hand, it appear that greater damage would arise to the plaintiff by withholding the injunction, in the event of the legal right proving to be in his favour, than to the defendant by granting the injunction, in the event of the injunction proving afterwards to have been wrongly granted, the injunction will issue (*x*). The burden lies upon the plaintiff, as the person applying for the injunction, of showing that his inconvenience exceeds that of the defendant. He must make out a case of a comparative inconvenience entitling him to the interference of the Court (*y*).

(*t*) *Bacon* v. *Jones*, 4 M. & C. 433, 436; 48 R. R. 143; *Hilton* v. *Lord Granville*, Cr. & Ph. 283, 297; 10 L. J. Ch. 398; 54 R. R. 297; *Munro* v *Wivenhoe, etc., Railway Co.*, 4 De G. J. & S. p. 733; *Elmhirst* v. *Spencer*, 2 Mac. & G. p. 50; 86 R. R. 16; *Carmichael* v. *Evans*, (1904) 1 Ch. 492, 493; 73 L. J. Ch. p. 333; *Arnott* v. *Whitby District Council*, (1909) 73 J. P. 64; *Crisp* v. *Holden*, (1910) 54 S. J. 784.

(*u*) *East Lancashire Railway Co.* v. *Hattersley*, 8 Ha. 93, 94; 85 R. R. 215; see *Palace Theatres Co.* v. *Clensy*, (1909) 26 T. L. R. 28.

(*x*) *Greenhalgh* v. *Manchester and Birmingham Railway Co.*, 3 M. & C. 784, 799; 8 L. J. (N. S.) Ch. 75; 45 R. R. 393; *Hilton* v. *Lord Granville*, Cr. & Ph. p. 297; 10 L. J. Ch. 398; 54 R. R. 297; *Plimpton* v. *Spiller*, 4 C. D. 286; *Elwes* v. *Payne*, 12 C. D. 468; 48 L. J. Ch. 831; *Mitchell* v. *Henry*, 15 C. D. p. 191; *Newson* v. *Pender*, 27 C. D. 43; *Carmichael* v. *Evans*, (1904) 1 Ch. 492; 73 L. J. Ch. 333; *Arnott* v. *Whitby District Council*, (1909) 73 J. P. 64; *Crisp* v. *Holden*, (1910) 54 S. J. 784.

(*y*) *Child* v. *Douglas*, 5 De G. M. & G. 741, 742; 104 R. R. 262.

In balancing the comparative convenience or inconvenience from granting or withholding an injunction, the Court will take into consideration what means it has of putting the party who may be ultimately successful in the position he would have stood if his legal rights had not been interfered with (*z*).

Interlocutory injunction ancillary to relief at the trial.

In a case where one of two defendants in an action for specific performance of an agreement for a lease was an infant, the Court refused to grant an interlocutory injunction to restrain the defendants from leasing the property to a third party as the plaintiff was not entitled to specific performance against both defendants (*a*).

Terms imposed on defendant as the condition of not granting the injunction.

The Court may often by imposing terms on one party, as the condition of either granting or withholding the injunction, secure the other party from damage in the event of his proving ultimately to have the legal right. If the Court feels that it can by imposing terms on the defendant secure the plaintiff, in the event of the legal right being determined in his favour, against damage from what may be done by the defendant in the meantime, and the defendant is willing to accede to the terms required by the Court, an injunction will not issue (*b*). The terms imposed on the defendant as the condition of withholding the injunction vary with the circumstances and the exigencies of the case. The defendant may be required to do such acts, or execute such works, or to remove any works, or otherwise deal with the same as the Court shall direct (*c*), or

(*z*) *Sanxter* v. *Foster*, Cr. & Ph. 302; 54 R. R. 307; *Rigby* v. *Great Western Railway Co.*, 2 Ph. 44; 15 L. J. Ch. 266; 78 R. R. 12; *East Lancashire Railway Co.* v. *Hattersley*, 8 Ha. p. 94; 85 R. R. 215; *Arnott* v. *Whitby District Council*, (1909) 73 J. P. 64.

(*a*) *Lumley* v. *Ravenscroft*, (1895) 1 Q. B. 683; 64 L. J. Q. B. 441.

(*b*) *Rigby* v. *Great Western Railway Co.*, 2 Ph. 44 50; 15 L. J. Ch. 266; 78 R. R. 12; *Cromford and High Peak Railway Co.* v. *Stockport, etc., Railway Co.*, 1 De G. & J. 326; 118 R. R. 118; *Low* v. *Innes*, 4 De G. J. & S. 286; *Elwes* v. *Payne*, 12 C. D. 470; 48 L. J. Ch. 831; *Mitchell* v. *Henry*, 15 C. D. 191; *Wall* v. *London Assets Corporation*, (1898) 2 Ch. 469; 67 L. J. Ch. 596; *Smith* v. *Baxter*, (1900) 2 Ch. 138, 148; 69 L. J. Ch. 442.

(*c*) *Att.-Gen.* v. *Manchester and Leeds Railway Co.*, 1 Ra. Ca. 436; *Ford* v. *Oye*, 6 W. R. 235; *Waterlow* v. *Bacon*, L. R. 2 Eq. 514; 35 L. J. Ch. 643; *Barker* v. *North Staffordshire Railway*, 2 De G. & S. 55; 79 R. R. 125; *Smith* v. *Baxter*, (1900) 2 Ch. p. 148; 69 L. J. Ch. p. 442.

to enter into an undertaking to refrain from doing in the meantime the acts complained of (*d*), or to abide by any order the Court may make as to damages or otherwise, in the event of the legal right being determined in favour of the plaintiff (*e*). If the permission to do the act complained of involves the making of profits, the defendant will be required to keep an account of all profits made pending the trial of the right (*f*); and may also be required to pay such a sum by way of damages (in the event of the plaintiff's right being established) as the Court may direct (*g*).

Where an injunction is withheld upon the condition of the defendant entering into an undertaking as to terms, the Court may make it a part of the order that if default is made in complying with the order the injunction shall issue (*h*).

Terms imposed on plaintiff as a condition of granting an injunction.

As on the one hand the Court may in doubtful cases, as a condition of withholding an injunction, require the defendant to enter into terms, so on the other hand it will, as a condition of granting an injunction, require the plaintiff to enter into an undertaking as to damages in the event of the right at law being determined in favour of the defendant, and the injunction proving to have been wrongly granted (*i*). The undertaking was formerly required only in cases when the application was *ex parte*, but the present practice is to require the undertaking as well where the motion is on notice as where it is *ex parte* (*k*). The Court, however, has no power

(*d*) *Clarke* v. *Clarke*, 13 W. R. 133.

(*e*) *Jones* v. *Great Western Railway Co.*, 1 Ra. Ca. 685; *McNeill* v. *Williams*, 11 Jur. 344; *Ford* v. *Gye*, 6 W. R. 235.

(*f*) *Bramwell* v. *Halcomb*, 3 M. & C. 737; 45 R. R. 378; *Rigby* v. *Great Western Railway Co.*, 2 Ph. 44; 15 L. J. Ch. 266; 78 R. R. 12; *Cory* v. *Yarmouth and Norwich Railway Co.*, 3 Ha. 603; 64 R. R. 435; *Elwes* v. *Payne*, 12 C. D. 470; 48 L. J. Ch. 831; *Mitchell* v. *Henry*, 15 C. D. 191.

(*g*) *Rigby* v. *Great Western Railway Co.*, 2 Ph. 44, 50; 15 L. J. Ch. 266; 78 R. R. 12.

(*h*) *Proprietors of Northam Bridge and Roads* v. *London and Southampton Railway Co.*, 9 L. J. Ch. 277; 1 Ra. Ca. 653; *Spencer* v. *London and Birmingham Railway Co.*, 1 Ra. Ca. 159; *Att.-Gen.* v. *Eastern Railways Co.*, 3 Ra. Ca. 337.

(*i*) *Chappell* v. *Davidson*, 8 De G. M. & G. 1; *Graham* v. *Campbell*, 7 C. D. 490; 47 L. J. Ch. 593; Practice Note, (1904) W. N. 203, 208; *Oberrheinische Metallwerke Co.* v. *Cocks*, (1906) W. N. 127.

(*k*) *Smith* v. *Day*, 21 C. D. p. 424; *Chappell* v. *Davidson*, 8 De G. M. &

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to compel a party applying for an injunction to give an undertaking as to damages, but if the applicant refuses to give the undertaking in a case in which the Court considers it ought to be given, the order for an injunction will not be made, or if pronounced will not be drawn up (*l*). According to the practice in the Chancery Division, when a defendant offers an undertaking which is accepted by the plaintiff in lieu of an injunction, a cross undertaking in damages by the plaintiff will be inserted in the order unless the contrary is agreed and expressed at the time (*m*).

Terms imposed on plaintiff as a condition of granting an injunction.

Where the question at issue has reference to the payment of money (*e.g.*, where a mortgagor seeks to restrain his mortgagee from selling (*n*), or where a person seeks to restrain a company from forfeiting his shares for non-payment of calls (*o*), or where a tenant seeks to restrain a distress (*p*)), the Court may, as a condition of granting an injunction, require the money to be paid into Court.

The Court may, on granting an injunction, put the plaintiff on an undertaking to prosecute the action with due dili-

G. 1; 114 R. R. 1; *Tuck* v. *Silver*, John. 218; 123 R. R. 82; *Fenner* v. *Wilson*, (1893) 2 Ch. 658; 62 L. J. Ch. 984; *Att.-Gen.* v. *Albany Hotel*, (1896) 2 Ch. 699; 65 L. J. Ch. 885; *Howard* v. *Press Printers Co.*, (1905) 74 L. J. Ch. 103, 104. In *Ingram* v. *Tuck*, cited in note to *Tuck* v. *Silver*, the defendant being clearly guilty of fraud, the Vice-Chancellor granted an injunction without requiring the plaintiff to give an undertaking as to damages. See further Chap. XXII., sects. 1 and 5, *post*.

(*l*) *Tucker* v. *New Brunswick Trading Co.*, 44 C. D. 249, 252; 59 L. J. Ch. 551, 552; *Att.-Gen.* v. *Albany Hotel Co.*, *Howard* v. *Press Printers Co.*, *supra*.

(*m*) See Pr. Note, (1904) W. N. 203, 208; *Oberrheinische Metallwerke Co.* v. *Cocks*, (1906) W. N. 127. Resolution of the Judges of the C. D., in consequence of the decision of the C. A. in *Howard* v. *Press Printers Co.*, *supra* (*k*), that there is no general practice that a cross undertaking in damages by the plaintiff is to be implied.

(*n*) *Whitworth* v. *Rhodes*, 20 L. J. Ch. 105; *Macleod* v. *Jones*, 24 C. D. 289; 53 L. J. Ch. 149; *Warner* v. *Jacob*, 20 C. D. p. 234; 51 L. J. Ch. 642.

(*o*) *Lamb* v. *Sambas Rubber Co.*, (1908) 1 Ch. 845; 77 L. J. Ch. 386; *Jones* v. *Pacaya Rubber Co.* (1911) 1 K. B. 455; 80 L. J. K. B. 157.

(*p*) *Shaw* v. *Lord Jersey*, 4 C. P. D. 120, 359, affirming 48 L. J. C. P. 308; *Carter* v. *Salmon*, 43 L. T. 490; *Walsh* v. *Lonsdale*, 21 C. D. 9; 52 L. J. Ch. 2; see *Lewis* v. *Baker*, (1905) 1 Ch. p. 47; 74 L. J. Ch. 39.

gence (*q*). The Court may also, upon granting or refusing an injunction, impose terms as to admissions being made at the trial (*r*).

Undertaking as to damages not required from Crown.

In granting an interlocutory injunction at the instance of the Attorney-General, suing on behalf of the Crown, the Court will not require an undertaking as to damages to be given (*s*).

Interim restraining order.

Instead of issuing the injunction in the first instance, the prohibition of the Court is often issued and conveyed in the shape merely of an interim restraining order, by which the defendant is restrained until after a particular day named, liberty being given to the plaintiff to serve notice of motion for an injunction for that day (*t*).

Dismissal of action unless Court can form a favourable opinion as to the merits.

If the plaintiff has not, in the opinion of the Court, laid a sufficient foundation for his action, it will be dismissed. The Court will not order the motion to stand over or retain an action, unless it has a favourable opinion on the merits of the case (*u*). Nor will the Court, unless the circumstances of the case are such as to lead it to form an opinion as to the legality of the act complained of, or to put the case into a course of immediate investigation, allow the motion to stand over till the purpose has been so far executed as that its character may be judged of, but will refuse the motion (*x*). An injunction will not be granted on the principle that it will do no harm to the defendant, if he has not done the act complained of (*y*).

Injunction pending appeal.

The mere fact that an appeal may be pending is not a ground for refusing an injunction to restrain the violation of

(*q*) *Newson* v. *Pender*, 27 C. D. 43, 63; *Palace Theatres Co.* v. *Clensy*, (1910) 26 T. L. R. 28.

(*r*) *Hilton* v. *Lord Granville*, Cr. & Ph. 283; 10 L. J. Ch. 398; 54 R. R. 297; *Sweet* v. *Cater*, 11 Sim. 572; 54 R. R. 439; *Dickens* v. *Lee*, 8 Jur. 186; *Bohn* v. *Bogue*, 10 Jur. 420.

(*s*) *Att.-Gen.* v. *Albany Hotel Co.*, (1896) 2 Ch. 696; 65 L. J. Ch. 885; and see further, as to undertakings for damages, *post*, Chap. XXII., sects. 1 and 5.

(*t*) See *post*, Chap. XXII., s. 1.

(*u*) *Wicks* v. *Hunt*, John. 372, 381; 123 R. R. 157; *Ware* v. *Regent's Canal Co.*, 3 De G. & J. p. 231; 28 L. J. Ch. 153; 121 R. R. 80.

(*x*) *Haines* v. *Taylor*, 2 Ph. 209; 78 R. R. 71; *Att.-Gen.* v. *Corporation of Manchester*, (1893) 2 Ch. p. 91; 62 L. J. Ch. 463.

(*y*) *Coffin* v. *Coffin*, Jac. p. 72; 23 R. R. 1.

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a legal right, though it may influence the decision of the Court as to the date at which the injunction should commence (*z*). Mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of his decree (*a*). The Court may, however, suspend the operation of the injunction for a given time if there is danger of irreparable mischief being done in the meantime, or to enable the defendant to appeal (*b*); and the Court may, on a proper case being made out, restrain by injunction dealings with a fund pending an appeal to the House of Lords, although the Court has decided against the title of the plaintiff and dismissed the action (*c*). The jurisdiction, however, will be exercised with care and so as not to encourage any one to present an appeal for the purpose of delay (*d*).

SECTION 2.—PERPETUAL INJUNCTIONS—MANDATORY INJUNCTIONS.

Sect. 2.

Perpetual Injunctions.

After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case, such as laches, or where the interference with the plaintiff's right is trivial (*e*). So also where a public body

(*z*) *Att.-Gen.* v. *Bradford Canal Co.*, L. R. 2 Eq. 71; 35 L. J. Ch. 619; *Penn* v. *Bibby*, L. R. 3 Eq. 308; see *Att.-Gen.* v. *Birmingham, Tame, etc., District Board*, (1910) 1 Ch. p. 62; 79 L. J. Ch. 137; (1912) A. C. 788; 82 L. J. Ch. 45; *Schweder* v. *Worthing Gas, Light and Coke Co.*, (1912) 81 L. J. Ch. 102.

(*a*) *Walford* v. *W.*, 3 Ch. 814.

(*b*) *Walford* v. *W.*, 3 Ch. 812, 814; *Andrews* v. *Abertillery Urban Council*, (1911) 2 Ch. p. 414; 80 L. J. Ch. p. 742; *Schweder* v. *Worthing Gas, Light and Coke Co.*, (1912) 81 L. J. Ch. 102.

(*c*) *Polini* v. *Gray*, 12 C. D. 438; *Wilson* v. *Church*, 12 C. D. 454; 28 W. R. 284.

(*d*) *Polini* v. *Gray*, *supra*, 446, 447.

(*e*) *Imperial Gas Co.* v. *Broadbent*, 7 H. L. C. 612; 29 L. J. Ch. 377; 115 R. R. 295; and see *Llandudno District Council* v. *Woods*, (1899) 2 Ch. 705; 68 L. J. Ch. 623; *Shelfer* v. *City of London Electric Co.*, (1895) 1 Ch. p. 314; 64 L. J. Ch. 216, 226; *Jordeson* v. *Sutton, etc., Gas Co.*, (1899) 2 Ch. 238; 68 L. J. Ch. 457, 476; *Cowper* v. *Laidler*, (1903) 2 Ch. 337, 341; 72 L. J. Ch. 580; *Colls* v. *Home and Colonial Stores*, (1904) A. C. 212; 73 L. J. Ch. 502; *Behrens* v. *Richards*, (1905) 2 Ch. 614; 74

is exceeding its powers, or committing an offence against a statute, the Attorney-General is, as a general rule, entitled to an injunction, although not as a matter of right in all circumstances, for the Court has a discretion (*f*).

Tho jurisdiction to grant a perpetual injunction is founded on the equity of relieving a party from the necessity of bringing action after action at law for every violation of a common law right, and of finally quieting the right, after a case has received such full decision as entitles a person to be protected against further trials of the right (*g*).

A perpetual injunction should not however be granted to protect a right having only a limited duration; in such a case the injunction should be limited to the period of the plaintiff's interest in the subject-matter of the action (*h*).

Declaration of right with liberty to apply for an injunction.

Where a defendant has given an undertaking to the Court not to infringe tho plaintiff's rights, and there is no probability that the wrongful act will be repeated, the Court may, instead of granting an immediate injunction, make a declaration of the plaintiff's rights, and give him liberty to apply

L. J. Ch. 615; *Marriott* v. *East Grinstead Gas Company*, (1905) 1 Ch. 70, 79; 78 L. J. Ch. 141; *Att.-Gen.* v. *Birmingham, Tame, ... trict Drainage Board*, (1910) ... 60; 79 L. J. Ch. 143; ... *Architects* v. *Kendrick*, (191... L. T. 526; 26 T. L. R. 493; and see *Weatherby & Co.* v. *International Horse Agency Co.*, (1910) 2 Ch. p. 305; 79 L. J. Ch. p. 613; *Slazenger* v. *Spalding*, (1910) 1 Ch. 257; 79 L. J. Ch. 122. As to the right to an injunction to restrain the breach of a negative covenant though the damage be slight, see *Doherty* v. *Allman*, 3 A. C. 719, 720; *McEacharn* v. *Colton*, (1902) A. C. p. 107; 71 L. J. P. C. p. 21; *Formby* v. *Barker*, (1903) 2 Ch. p. 554; 72 L. J. Ch. p. 721; *Elliston* v. *Reacher*, (1908) 2 Ch. p. 395; 79 L. J. Ch. p. 628; *Att.-Gen.* v. *Walthamstow Urban Council*, (1910) 1 Ch. p. 351; 79 L. J. Ch. p. 269; and *post*, Chap. X.

(*f*) *Att.-Gen.* v. *Wimbledon House Estate Co.*, (1904) 2 Ch. 34, 42; 73 J. Ch. 593, 596; *Att.-Gen.* v. *Grand Junction Canal Co*, (1909) 2 Ch. 505; 78 L. J. Ch. 681; *Att.-Gen.* v. *Birmingham, Tame, etc., Drainage Board*, (1910) 1 Ch. 53; 79 L. J. Ch. 139; (1912) A. C. 788, 794, 812; 82 L. J. Ch. 45.

(*g*) *Imperial Gas Co.* v. *Broadbent*, 7 H. L. C. 612; 29 L. J. Ch. 377; 115 R. R. 295; *Lowndes* v. *Bettle*, 33 L. J. Ch. 451; *Hanbury* v. *Llanfrechfa Urban Council*, (1911) 75 J. P. p. 308; 9 L. G. R. p. 365.

(*h*) *Savory* v. *Gyptican Oil Co.*, (1904) 48 Sol. J. 573; *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. 707, 712; 73 L. J. Ch. 275.

for an injunction, in the event of the defendant repeating the offence, or threatening to disturb the plaintiff's rights (*i*).

The fact that trifling or merely nominal damages may have been recovered at law (*j*), or that the damage is small (*k*), is not *per se* a sufficient ground for refusing to grant a perpetual injunction, but it is a circumstance which the Court will take into consideration in determining whether to exercise its jurisdiction (*l*). The Court will in general have regard not only to the dry strict rights of the plaintiff and defendant, but also to the surrounding circumstances (*m*), and the conduct of the parties (*n*). The consideration of the balance of convenience and inconvenience in granting or withholding the injunction is not neglected by the Court. If granting the injunction would have the effect of inflicting serious damage upon the defendant without restoring or tending to restore the plaintiff to the position in which he originally stood, or doing him any real practical good (*o*); or if the mischief complained of is trivial (*p*), or can be properly, fully, and adequately compensated by a pecuniary

Damages in lieu of injunction.

(*i*) *Wilcox* v. *Steel*, (1904) 1 Ch. 222, 223; 73 L. J. Ch. p. 220; *Brigg* v. *Thornton*, (1904) 1 Ch. p. 394; 73 L. J. Ch. p. 306; *Att.-Gen.* v. *Birmingham, Tame, etc., Drainage Board*, (1910) 1 Ch. p. 62; 79 L. J. Ch. p. 144; *Hanbury* v. *Llanfrechfa Urban Council*, *supra* (*g*).

(*j*) *Rochdale Canal Co.* v. *King*, 2 Sim. N. S. 78, 86; 20 L. J. Ch. 675; 89 R. R. 211.

(*k*) *Marriott* v. *East Grinstead Gas Co.*, (1909) 1 Ch. 70; 78 L. J. Ch. 141.

(*l*) *Wood* v. *Sutcliffe*, 2 Sim. N. S. p. 165; 21 L. J. Ch. 253; *Shelfer* v. *City of London Electric Co.*, (1895) 1 Ch. 314; 64 L. J. Ch. 226; and *Cowper* v. *Laidler*, (1903) 2 Ch. 341; 72 L. J. Ch. 580; *Kine* v. *Jolly*, (1905) 1 Ch. 503, 504; *Riley* v. *Halifax Corporation*, (1907) 97 L. T. 278.

(*m*) *Wood* v. *Sutcliffe*, *supra*; *National Provincial Co.* v. *Prudential Assurance Co.*, 6 C. D. p. 769; 46 L. J. Ch. p. 875; *Warwick and Birmingham Canal Co.* v. *Burnam*, (1890) 63 L. T. 670; *Llandudno Urban Council* v. *Woods*, (1899) 2 Ch. 705; 68 L. J. Ch. 623; *Cowper* v. *Laidler*, *supra*; *Behrens* v. *Richards*, (1905) 2 Ch. 614; 74 L. J. Ch. 615; *Harrington* (*Earl*) v. *Derby Corporation*, (1905) 2 Ch. 220, 221; 74 L. J. Ch. 214. See *post*, Chap. X., as to cases depending on contract.

(*n*) *Kine* v. *Jolly*, *supra*; *Jones* v. *Earl Tankerville*, (1909) 2 Ch. p. 446; 78 L. J. Ch. p. 676.

(*o*) *Wood* v. *Sutcliffe*, 2 Sim. N. S. 163, 168; 21 L. J. Ch. 253; 89 R. R. 262; *Riley* v. *Halifax Corporation*, (1907) 97 L. T. 278.

(*p*) *Llandudno District Council* v. *Woods*, (1899) 2 Ch. 705; 68 L. J. Ch. 623; *Behrens* v. *Richards*, (1905) 2 Ch. 622; 74 L. J. Ch. 619; *English* v. *Metropolitan Water Board*, (1907) 1 K. B. p. 603; 76 L. J. K. B. p. 370.

sum (*q*), an injunction will not issue. If, on the other hand, the defendant has covenanted that a particular thing shall not be done (*r*), or the mischief complained of is of so material a nature that it cannot be adequately compensated by a pecuniary sum, and granting an injunction will restore or tend to restore the parties to the position in which they formerly stood and have a right to stand, it is the duty of the Court to interfere by perpetual injunction, notwithstanding the serious damage caused thereby to the defendant (*s*).

Suspension of injunction.

If a considerable time must elapse to enable the parties to comply with an injunction, the Court will order that the operation of the injunction be suspended for a certain stated period (*t*). Considerations of public welfare also may justify the suspension of an injunction upon terms (*u*).

(*q*) *Wood* v. *Sutcliffe*, 2 Sim. N. S. 166, 169; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. p. 317; 64 L. J. Ch. p. 226; *Cowper* v. *Laidler*, (1903) 2 Ch. p. 341; 72 L. J. Ch. p. 580; *Colls* v. *Home and Colonial Stores*, (1904) A. C. 193, 194; 73 L. J. Ch. p. 492; *Kine* v. *Jolly*, (1905) 1 Ch. 496; (1907) A. C. 1; 74 L. J. Ch. 183; 76 L. J. Ch. 1 (on appeal); *English* v. *Metropolitan Water Board*, *supra* (*p*); *Riley* v. *Halifax Corporation*, *supra* (*o*).

(*r*) *Doherty* v. *Allman*, 3 A. C. p. 720; *McEacharn* v. *Colton*, (1902) A. C. p. 107; *Formby* v. *Barker*, (1903) 2 Ch. p. 554; 72 L. J. Ch. p. 721; *Elliston* v. *Reacher*, (1908) 2 Ch. p. 395; 79 L. J. Ch. p. 628; *Att.-Gen.* v. *Walthamstow Urban Council*, (1910) 1 Ch. p. 351; 79 L. J. Ch. p. 269.

(*s*) *Wood* v. *Sutcliffe*, *supra* (*q*); *Imperial Gas Co.* v. *Broadbent*, 7 H. L. C. 600; 29 L. J. Ch. 377; 115 R. R. 295; *Tipping* v. *St. Helens Smelting Co.*, 1 Ch. 66; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. 287; 64 L. J. Ch. 216; *Cowper* v. *Laidler*, *supra* (*q*); *Kine* v. *Jolly*, (1905) 1 Ch. 495, 496, 504; 74 L. J. Ch. 183; *Att.-Gen.* v. *Birmingham, Tame, etc., Drainage Board*, (1910) 1 Ch. 48, 60; 79 L. J. Ch. 143; (1912) A. C. 788; 82 L. J. Ch. 45.

(*t*) *Att.-Gen.* v. *Bradford Canal Co.*, L. R. 2 Eq. 83, 84; 35 L. J. Ch. 621; *Att.-Gen.* v. *Willesden District Council*, 12 T. L. R. 528; *Reinhardt* v. *Mentasti*, 42 C. D. 690; 58 L. J. Ch. 789; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 2 Ch. 388; 64 L. J. Ch. 736; *Roberts* v. *Gwyrfrai District Council*, (1899) 2 Ch. 615; 68 L. J. Ch. 759; *Islington Vestry* v. *Hornsey Urban Council*, (1900) 1 Ch. 707; *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. p. 713; 73 L. J. Ch. 279; *Att.-Gen.* v. *Faversham Corporation* (1908) 72 J. P. 404; *Att.-Gen.* v. *Gibb*, (1909) 2 Ch. 279; 78 L. J. Ch. 528; *Stancomb* v. *Trowbridge Urban Council*, (1910) 2 Ch. p. 191; 79 L. J. Ch. 519; *Att.-Gen.* v. *Birmingham, Tame,*

For note (*u*) see next page.

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Acquiescence.

The principles of the Court with respect to delay and acquiescence applicable to the case of interlocutory injunctions hold also in the case of applications for perpetual injunctions (*v*). But to justify the Court in refusing to interfere at the hearing, there must be a stronger case of acquiescence than is sufficient to be a bar on the interlocutory application (*w*). A man who, possessing a full knowledge of his rights, has lain by and has by his conduct encouraged others to expend moneys in contravention of the rights for which he afterwards contends, cannot come to the Court for relief by perpetual injunction, however clear his right or whatever may be the value of the right, but must rest satisfied with such damages as a jury will give (*x*). A man may by acquiescence not only preclude himself from being able to derogate from a state of things which has been brought about by his own conduct, but may even give the adverse party a right to the interference of the Court in the event of his complaining at law (*y*). So also, in the case of actions by the Attorney-General on behalf of the public, delay is a circumstance which may be taken into consideration by the Court

Delay in actions by the Attorney-General.

etc., District Drainage Board, (1910) 1 Ch. 48, 62; 79 L. J. Ch. 137, 144; (1912) A. C. 788; 82 L. J. Ch. 45; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. 393, 411; 80 L. J. Ch. 154; S. C. (1912) 76 J. P. Jo. 243, where an undertaking in damages was required on a further suspension; *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 509; 105 L. T. 701.

(*u*) *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. p. 544; 78 L. J. Ch. p. 13. See *Att.-Gen.* v. *South Staffordshire Waterworks Co.* (1909), 25 T. L. R. 408, where the injunction was suspended, as the defendants were promoting a Bill in Parliament to secure powers to do the act complained of.

(*v*) See pp. 21—25, *ante*, and *Att.-Gen.* v. *Grand Junction Canal Co.*, (1909) 2 Ch. 508, 518; 78 L. J. Ch. 681, 685.

(*w*) *Johnson* v. *Wyatt*, 2 De G. J. & S. 18; 33 L. J. Ch. 394; *ante*, p. 18.

(*x*) *Dann* v. *Spurrier*, 7 Ves. 231, 235; 6 R. R. 119; *Rochdale Canal Co.* v. *King*, 2 Sim. N. S. 88; 16 Beav. 630; 20 L. J. Ch. 675; 89 R. R. 211; *Wood* v. *Sutcliffe*, 2 Sim. N. S. 169; 21 L. J. Ch. 253; 89 R. R. 262; *Davies* v. *Sear*, L. R. 7 Eq. 427; 38 L. J. Ch. 545. See *Gale* v. *Abbott*, 8 Jur. N. S. 987; *Leeds (Duke of)* v. *Amherst*, 2 Ph. 123; 15 L. J. Ch. 351; 78 R. R. 47; *Willmott* v. *Barber*, 15 C. D. 105, 106; *Civil Service Instrument Co.* v. *Whiteman*, (1899) 68 L. J. Ch. 484.

(*y*) *Williams* v. *Earl of Jersey*, Cr. & Ph. 97; 10 L. J. Ch. 149; 54 R. R. 219.

in determining whether to grant an injunction, whether it be an injunction against continuing to do something, or whether it be in the form of a mandatory injunction (*z*). But the Court will not act upon light grounds against the legal right of the parties. It requires a clear and strong case to lead the Court to deprive a party of his right at law to prevent a particular act being done, or his right to recover damages if it be done. There must be fraud or such acquiescence as in the view of the Court would make it a fraud in him afterwards to insist upon his legal right (*a*); and it seems that *mere delay* will not disentitle a plaintiff to an injunction in aid of a legal right unless the claim to enforce the right is barred by the Statutes of Limitations (*b*).

Perpetual injunctions not granted before the hearing without consent.

A perpetual injunction will not, as a rule, without consent be granted before the trial, but an injunction may by consent be made perpetual on motion (*c*).

A man is not bound to apply by motion in the first instance. He may obtain a perpetual injunction at the hearing, although he has not applied for an injunction on interlocutory application (*d*); and where a mandatory injunction is sought it is

(*z*) *Att.-Gen.* v. *Wimbledon House Estate Co.*, (1904) 2 Ch. p. 42; 73 L. J. Ch. p. 595; *Att.-Gen.* v. *Scott*, (1905) 2 K. B. p. 169; 74 L. J. K. B. 803; *Att.-Gen.* v. *Metcalf and Greig*, (1907) 2 Ch. pp. 34, 35; 76 L. J. Ch. 259 (reversed on appeal on another point), (1908) 1 Ch. 372; 77 L. J. Ch. 261; *Att.-Gen.* v. *Grand Junction Canal Co.*, (1909) 2 Ch. p. 518; 78 L. J. Ch. 685; *Att.-Gen.* v. *South Staffordshire Waterworks Co.*, (1909) 25 T. L. R. 408; *Att.-Gen.* v. *Birmingham, Tame, etc., Drainage Board*, (1910) 1 Ch. p. 53; 79 L. J. Ch. p. 143; (1912) A. C. p. 812; 82 L. J. Ch. 45; cf. *Att.-Gen.* v. *South Staffordshire Waterworks Co.*, *supra*, as to delay in cases of *ultra vires*.

(*a*) *Gerrard* v. *O'Reilly*, 3 Dr. & War. 433; 61 R. R. 97; *Bankart* v. *Houghton*, 27 Beav. 431; 28 L. J. Ch. 473; 122 R. R. 471; *Hogg* v. *Scott*, L. R. 18 Eq. 454; 43 L. J. Ch. 705; *Smith* v. *Smith*, L. R. 20 Eq. 503; 44 L. J. Ch. 630; *Willmott* v. *Barber*, 15 C. D. 105; *Proctor* v. *Bennis*, 36 C. D. 740; 57 L. J. Ch. 11; *Civil Service Musical Instrument Co.* v. *Whiteman*, (1909) 68 L. J. Ch. 484.

(*b*) *Fullwood* v. *F.*, 9 C. D. 176; 47 L. J. Ch. 459; *Archbold* v. *Scully*, 9 H. L. C. 383; *London, Chatham, and Dover Railway Co.* v. *Bull*, 47 L. T. 413, 416; see *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. 393, 411; 80 L. J. Ch. 154.

(*c*) *Day* v. *Snee*, 3 V. & B. 170; *Morrell* v. *Pearson*, 12 Beav. 284; *Aslatt* v. *Southampton Corporation*, 16 C. D. p. 150; 50 L. J. Ch. p. 34.

(*d*) *Bacon* v. *Jones*, 4 M. & C. 436; 48 R. R. 143; *Davies* v. *Marshall*,

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not unusual to wait until the hearing before applying for the injunction (*e*).

Account.

If the act complained of involves the making of profits, the account is limited to the profits actually made and the moneys actually received by the wrongdoer. There can be no account in respect of acts unattended with profit (*f*). The account is of all profits actually made for six years prior to the bringing of the action, but the account will not be so limited when the defendant has been guilty of a wilful and secret trespass, and the plaintiff has not been guilty of laches in not discovering the wrongful acts of the defendant (*g*). An account will not be granted if there has been great delay in bringing the action (*h*).

In consequence of the difficulty of working out a decree for an account of profits, such an account is not usually taken. A reasonable compromise is generally found to be most for the benefit of the parties (*i*). If the amount of profits for which the defendant would have to account is small, the plaintiff usually waives the account (*k*), and if the defendant submits, the suit does not proceed to the hearing, but a decretal order is made, giving effect to the agreement between the parties. The plaintiff is entitled to discovery for the purposes of the account (*l*).

Costs of Action.

Where a plaintiff comes to enforce a legal right and there has been no neglect or misconduct on his part, the Court will not as a general rule take away his right to costs (*m*). There

1 Dr. & Sm. 560, 561; *Gale* v. *Abbott*, 8 Jur. N. S. 987.

(*e*) *Gale* v. *Abbott*, *supra*.

(*f*) *Colburn* v. *Simms*, 2 Ha. 560; 12 L. J. Ch. 388; 62 R. R. 225; *Powell* v. *Aikin*, 4 K. & J. 343. 351; 116 R. R. 358. See *Muddock* v. *Blackwood*, (1898) 1 Ch. 58.

(*g*) *Dean* v. *Thwaite*, 21 Beav. 623; 111 R. R. 228; *Bulli Coal Co.* v. *Osborne*, (1899) A. C. 351; 68 L. J. P. C. 49; *Glyn* v. *Howell*, (1909) 1 Ch. 666, 679; 78 L. J. Ch. 391.

(*h*) *Crossley* v. *Derby Gas Light Co.*, 4 L. J. (N. S.) Ch. 25; 1 Webs. 119, 120; 41 R. R. 198; *Parrott* v. *Palmer*, 3 M. & K. 643; 41 R. R. 149; *Harrison* v. *Taylor*, 11 Jur. N. S. 408.

(*i*) *Crossley* v. *Derby Gas Light Co.*, 3 M. & C. 428, 436; 4 L. J. (N. S.) Ch. 25; 41 R. R. 198.

(*k*) See *Fradella* v. *Weller*, 2 R. & M. 247; 34 R. R. 81.

(*l*) *Saxby* v. *Easterbrook*, L. R. 7 Ex. 207.

(*m*) *Cooper* v. *Whittingham*, 15 C. D. 504; 49 L. J. Ch. 752, *per* Jessel, M.R.; *Upman* v. *Forester*, 24 C. D. 231; 52 L. J. Ch. 946;

may be misconduct of many sorts: there may be misconduct in commencing the proceedings (*n*), or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct connected with the subject-matter of the action (*o*), which will induce the Court to refuse costs; but where there is nothing of the kind, the plaintiff is as a general rule entitled to his costs (*p*).

Where the plaintiffs brought an action against the defendant, who had innocently purchased in the market (at the price of 17*s.* 6*d.*) 500 cigarettes which infringed the plaintiffs' trade mark, the Court granted an injunction but refused to allow the plaintiffs their costs (*q*).

Injunction actions do not usually proceed to trial.

Actions for an injunction to restrain the violation of a legal right do not usually go to the hearing. If the defendant offers to submit to an injunction with costs, and to give the plaintiff all the other relief to which he may be under the circumstances of the case entitled, and no question remains open to be decided between the parties and no account is sought or the account is waived, and the plaintiff nevertheless proceeds to trial, the Court, though it may give the plaintiff the decree, will not give him the costs of the subsequent prosecution of the action up to the trial (*r*). The tender must include the costs

West v. *Gwynne*, (1911) 2 Ch. 1, 14; 80 L. J. Ch. 588. But see Order LXV. r. 1; and the Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5; also *The American Tobacco Co.* v. *Guest*, (1892) 1 Ch. 630; 61 L. J. Ch. 242; *Walter* v. *Steinkopff*, (1892) 3 Ch. 489, 500; 61 L. J. Ch. 521; *Florence* v. *Mallinson*, 65 L. T. 354, 358; and see *post*, Chap. XXII., sect. 1.

(*n*) *Fielden* v. *Cox*, (1906) 22 T. L. R. 411, a case of trivial trespass with no intention on the part of the defendant to repeat it. As to the power of the Court to order a plaintiff to pay costs, as between solicitor and client, of proceedings instituted against a defendant acting in execution of a statutory or public duty, when an opportunity of making amends has not been given to the defendant, see the Public Authorities Protection Act, 1893, s. 1 (d).

(*o*) *Lipman* v. *Pulman & Co.*, (1904) 91 L. T. 132; *King & Co.* v. *Gillard & Co.*, (1905) 2 Ch. 7; 74 L. J. Ch. 421; *Edison-Bell Phonographic Co.* v. *Smith*, (1905) 119 L. T. Jo. 106; *Rush* v. *Lucas*, (1910) 1 Ch. p. 443; 79 L. J. Ch. 174; *Att.-Gen.* v. *Parish*, (1913) 57 S. J. 625.

(*p*) See note (*m*), *supra*.

(*q*) *American Tobacco Co.* v. *Guest*, (1892) 1 Ch. 630; 61 L. J. Ch. 242.

(*r*) *Millington* v. *Fox*, 3 M. & C. 338; 45 R. R. 271; *Colburn* v.

Costs of action.

of the action up to the time when the tender is made (*s*). If the defendant does not offer to submit to the injunction and pay all the costs up to that time (*t*), or if, although he offers to submit to the injunction, he refuses to pay the costs, or to give the plaintiff any of the other relief to which he is entitled (*u*), or imposes a condition which the plaintiff is not bound to accept, *e.g.*, that the order should not be advertised, or that it should recite that the defendant had submitted for the sake of peace (*v*), the plaintiff is entitled to bring the action to trial and will have the costs of the action.

A plaintiff who obtains on an interlocutory application the relief which he seeks, should make an application to the defendant to have the costs disposed of on motion. If he does not do so, or if, on the application of the defendant to have the costs disposed of on motion, he refuses to give his consent, and no question remains open to be decided between the parties, he will not be entitled to have the costs occasioned by going on to trial. The question of costs cannot be determined

Simms, 2 Ha. 561; 12 L. J. Ch. 388; 62 R. R. 225; *Chappell* v. *Davidson*, 2 K. & J. 123; 114 R. R. 1; *Nunn* v. *Albuquerque*, 34 Beav. 595; *Sonnenschein* v. *Barnard*, 57 L. T. 713; *Walter* v. *Steinkopff*, (1892) 3 Ch. 489; 61 L. J. Ch. 521; *Jenkins* v. *Hope*, (1896) 1 Ch. 278; 65 L. J. Ch. 249; *Slazenger* v. *Spalding*, (1910) 1 Ch. 261; 79 L. J. Ch. 125; *Lever Bros.* v. *Equitable Pioneers Society*, (1912) 106 L. T. p. 474; 28 T. L. R. 294; *Brinsmead* v. *Brinsmead*, (1913) 29 T. L. R. 237.

(*s*) *Fradella* v. *Weller*, 2 R. & M. 247; 34 R. R. 81; *Geary* v. *Norton*, 1 De G. & S. 12; 75 R. R. 1; *Burgess* v. *Hill*, 26 Beav. 244; 28 L. J. Ch. 356; 122 R. R. 94; *Moet* v. *Couston*, 33 Beav. 579; *Nunn* v. *Albuquerque*, 34 Beav. 595; *Jenkins* v. *Hope*, (1896) 1 Ch. 278; 65 L. J. Ch. 249; *Slazenger* v. *Spalding*, *supra*.

(*t*) *Upmann* v. *Forester*, 24 C. D. 231; 52 L. J. Ch. 946; *Witman* v. *Oppenheim*, 27 C. D. 260; 54 L. J. Ch. 56; *Sonnenschein* v. *Barnard*, 57 L. T. 713; *Birmingham District Land Co.* v. *London and North Western Railway Co.*, 57 L. T. 185; *Schlesinger* v. *Turner*, 63 L. T. 764.

(*u*) *Fradella* v. *Weller*, 2 R. & M. 247; 34 R. R. 81; *Geary* v. *Norton*, 1 De G. & S. 12; 75 R. R. 1; *Chappell* v. *Davidson*, 2 K. & J. 123; 110 R. R. 134; *Burgess* v. *Hill*, 26 Beav. 244; 28 L. J. Ch. 356; 122 R. R. 94; *M'Andrew* v. *Bassett*, 4 D. J. & S. 380; *Sonnenschein* v. *Barnard*, *Birmingham District Land Co.* v. *London and North Western Railway Co.*, *Schlesinger* v. *Turner*, *supra*; *Fennessey* v. *Day and Martin*, 55 L. T. 161; *Hat Manufacturers' Supply Co.* v. *Tomlin*, (1906) 23 R. P. C. 413.

(*v*) *Henry Clay & Co.* v. *Godfrey Phillips*, (1910) 27 R. P. C. 508.

in this way without the consent of the parties, but the party who refuses to consent must justify his refusal, and must satisfy the Court that he is justified in bringing the action on to trial (*x*).

If both parties are in the wrong, the one claiming more than he is entitled to claim and the other offering less than he is bound to offer (*y*), or the one succeeding as to part of his claim and failing as to another part (*z*), no costs will be given to either side, or the costs as to which one party has failed will be taxed and set off against those in which he has succeeded, and the balance of such costs only will be paid to the party entitled to such costs (*a*).

If the defendant has been to blame in the matter, the dismissal of the action will be without costs (*b*).

A *bonâ fide* offer from the defendant before action to give the plaintiff all the relief to which he is entitled and which he ultimately obtains by the action, may be a reason for depriving the plaintiff of the costs (*c*).

Where a defendant offered to submit to a perpetual injunction to be obtained by the plaintiffs in chambers, but the plaintiffs set the action down on motion for judgment, the plaintiffs were only allowed such costs as they would have properly incurred if they had proceeded by summons in chambers (*d*).

(*x*) *Morgan* v. *Great Eastern Railway Co.*, 1 H. & M. 78; *Wilde* v. *Wilde*, 4 De G. F. & J. 348; *Sonnenschein* v. *Barnard*, 57 L. T. 712.

(*y*) *Moet* v. *Couston*, 33 Beav. 578; *Wood* v. *Saunders*, 10 Ch. p. 585; affirming 44 L. J. Ch. 514, 523; see *Att.-Gen.* v. *Parish*, (1913) 57 S. J. 625.

(*z*) *Russell* v. *Watts*, 25 C. D. p. 577; *Moore* v. *Bennett*, 1 R. P. C. 130.

(*a*) *Bourke* v. *Alexandra Hotel Co.*, 25 W. R. 782; *Nordenfelt* v. *Gardner*, 1 R. P. C. 65; *Sellors* v. *Matlock Board of Health*, 14 Q. B. D. 935; see *Cracknall* v. *Janson*, 11 C. D. 23; *Knight* v. *Pursell*, 49 L. J. Ch. 120; *Reinhardt* v. *Mentasti*, 42 C. D. p. 690; *Jenkins* v. *Jackson*, (1891) 1 Ch. 89; 60 L. J. Ch. 206; *Todd* v. *North Eastern Railway Co.*, (1903) 88 L. T. 112. See Order LXV. r. 27, sub-r. 21.

(*b*) *Wylam* v. *Clarke*, (1876) W. N. 68; *Harrison* v. *Goode*, 11 Eq. 354, 355; 40 L. J. Ch. 294, 301; *Borthwick* v. *Evening Post*, 37 C. D. p. 465; 57 L. J. Ch. 410; and see *Snuggs* v. *Seyd*, (1894) W. N. 95; *King* v. *Gillard*, (1905) 2 Ch. 7; 74 L. J. Ch. 421.

(*c*) *Millington* v. *Fox*, 3 M. & C. 338; 45 R. R. 271.

(*d*) *The London Steam Dyeing Co.*

If the costs of the action have been increased by an allegation in the statement of claim which is untrue, such increased costs will have to be paid by the plaintiff, although his case may be substantially established (*e*). But a wrongdoer cannot be heard to complain that in proceedings hurriedly taken to stop the wrong, the plaintiff has not accurately stated his title; in such a case the defendant will not be relieved from the payment of the extra costs occasioned by the plaintiff's mistake as to his title (*f*).

Costs will be ordered to be taxed on the higher scale where there are special grounds (*g*).

Mandatory Injunctions.

Although the Court of Chancery would not direct the performance of a positive act tending to alter the existing state of things (such as the removal of a work already executed), nevertheless, by framing its order in an indirect form, it would compel a defendant to restore things to their former condition, and so effectuate the same result as would be obtained by ordering a positive act to be done. The order when framed in such a form is called a *mandatory injunction*. The jurisdiction was formerly questioned (*h*), but its existence must be admitted as beyond all doubt (*i*); and it is now settled that the Court can frame the injunction in a positive form (*k*).

v. *Digby*, 57 L. J. Ch. 505; 58 L. T. 724; *Allen* v. *Oakey*, 62 L. T. 724.

(*e*) *Pierce* v. *Franks*, 15 L. J. Ch. 122; *Rose* v. *Loftus*, 47 L. J. Ch. 576.

(*f*) *Att.-Gen.* v. *Tomline*, 5 C. D. 750.

(*g*) Order LXV. r. 9; see *Hudson* v. *Osgerby*, 32 W. R. 556; *Turton* v. *T.*, 42 C. D. 128, 149; *American Braided Wire Co.* v. *Thomson*, 44 C. D. 274, 296; 59 L. J. Ch. 425; *Davies* v. *Davies*, 56 L. J. Ch. 620; *Rivington* v. *Garden*, (1901) 1 Ch. 561; 70 L. J. Ch. 282; *Great Western Railway Co.* v. *Carpalla Clay Co.*, (1909) 2 Ch. 471; 101 L. T. 383.

(*h*) See *Lane* v. *Newdigate*, 10 Ves. 192; 7 R. R. 381; and *Blakemore* v. *Glamorganshire Railway Co.*, 1 M. & K. p. 184; 2 L. J. (N. S.) Ch. 95; 36 R. R. 289.

(*i*) *Hervey* v. *Smith*, 1 K. & J. 392; 103 R. R. 141; *Smith* v. *Smith*, 20 Eq. 504; 44 L. J. Ch. 630; *Hermann Loog* v. *Bean*, 26 C. D. p. 314; 53 L. J. Ch. p. 1128.

(*k*) *Jackson* v. *Normanby Brick Co.*, (1899) 1 Ch. 438; 68 L. J. Ch. 407; *Davies* v. *Gas Light and Coke Co.*, (1909) 1 Ch. 259, 711; 78 L. J.

But the jurisdiction to grant a mandatory injunction is exercised with caution and is strictly confined to cases where the remedy by damages is inadequate for the purposes of justice, and the restoring things to their former condition is the only remedy which will meet the requirements of the case (*l*).

Every injunction and mandatory order should be certain and definite in its terms, and it ought to be quite clear what the person against whom the injunction or order is made is required to do, or to refrain from doing. An order therefore will not be made directing a defendant to repair such walls as may need repair (*m*).

The Court will not as a rule interfere by way of mandatory injunction without taking into consideration the comparative convenience and inconvenience which the granting or withholding the injunction would cause to the parties. Where the injury done is capable of being fully and abundantly compensated by a pecuniary sum, while the inconvenience to the other party from granting an injunction would be serious, the Court will not interpose by way of mandatory injunction, but will award damages by way of compensation for the injury (*n*). But where the act complained of is a breach of

Ch. 447; *Att.-Gen.* v. *Grand Junction Canal Co.*, (1909) 2 Ch. p. 516; 78 L. J. Ch. 684. For form of order restraining the erection of buildings so as to obstruct the plaintiff's ancient lights, with liberty to the plaintiff to apply for a mandatory injunction by way of further relief, see *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 194; 73 L. J. Ch. p. 493; and *Anderson* v. *Francis*, (1906) W. N. 160; *Higgins* v. *Betts*, (1905) 2 Ch. p. 218; 74 L. J. Ch. 621.

(*l*) See *Colls* v. *Home and Colonial Stores*, (1904) A. C. 193, 212; 73 L. J. Ch. 492, 502; *Kine* v. *Jolly*, (1905) 1 Ch. p. 504; *Waterhouse* v. *Waterhouse*, (1906) 94 L. T. 134; 22 T. L. R. 195; *Att.-Gen.* v. *Parish*, (1913) 57 S. J. 625.

(*m*) *Att.-Gen.* v. *Staffordshire County Council*, (1905) 1 Ch. p. 342; 74 L. J. Ch. p. 155; and see *Worcester College* v. *Oxford Canal Navigation Co.*, (1912) 81 L. J. Ch. p. 3.

(*n*) *Isenberg* v. *East India House Co.*, 3 De G. J. & S. 263; 33 L. J. Ch. 392; *Stanley (Lady)* v. *Shrewsbury (Lord)*, 19 Eq. 620; 44 L. J. Ch. 389; *National Provincial, etc., Co.* v. *Prudential Assurance Co.*, 6 C. D. 769; 46 L. J. Ch. 871; *Allen* v. *Seckham*, 11 C. D. 798; 48 L. J. Ch. 611; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. 322; 64 L. J. Ch. 226; *Cowper* v. *Laidler*, (1903) 2 Ch. 341; 72 L. J. Ch. 580: *Colls* v. *Home and Colonial*

a negative covenant (*o*), or the injury is of so serious or material a character that the restoring things to their former condition is the only remedy which will meet the requirements of the case, or the defendant has been guilty of sharp practices or unfair conduct, or has shown a desire to steal a march upon the plaintiff, or to evade the jurisdiction of the Court, the injunction will issue, notwithstanding the amount of inconvenience to the other party (*p*), and though the expense thereby caused to him will be out of proportion to any advantage the plaintiff may derive from it (*q*).

If the act complained of is continued or carried on after clear and distinct notice that it is objected to, or if during the progress of the action an undertaking has been given to pull down the building if so ordered at the trial, and the injury done is of a serious nature, the jurisdiction will be exercised more freely than in cases where complaint is not made until after the act is completed (*r*); but the mere fact that the act complained of has been continued or carried on after notice of

Stores, (1904) A. C. 193, 212; 73 L. J. Ch. 492; *English* v. *Metropolitan Water Board*, (1907) 1 K. B. 603; 76 L. J. K. B. 371; *Riley* v. *Halifax Corporation*, (1907) 97 L. T. 278; 23 T. L. R. 613; and see *Kine* v. *Jolly*, (1905) 1 Ch. p. 504; 74 L. J. Ch. p. 183.

(*o*) *Doherty* v. *Allman*, 3 A. C. p. 720; *McEacharn* v. *Colton*, (1902) A. C. p. 107; 71 L. J. P. C. p. 21; *Bickmore* v. *Dimmer*, (1903) 1 Ch. p. 168; 72 L. J. Ch. p. 100; *Formby* v. *Barker*, (1903) 2 Ch. p. 554; 72 L. J. Ch. p. 721; *Elliston* v. *Reacher*, (1908) 2 Ch. p. 395; 79 L. J. Ch. p. 628; *Att.-Gen.* v. *Walthamstow Urban Council*, (1910) 1 Ch. p. 351; 79 L. J. Ch. p. 269; and see *post*, Chap. X.

(*p*) *Isenberg* v. *East India House Co.*, 3 De G. J. & S. 263, 272; 33 L. J. Ch. 392, 397; *Durell* v. *Pritchard*, 1 Ch. 244; 35 L. J. Ch. 223; *Kelk* v. *Pearson*, 6 Ch. 812, 813; *Goodson* v. *Richardson*, 9 Ch. 221, 224; 43 L. J. Ch. 790; *Krehl* v. *Burrell*, 7 C. D. 551; 11 C. D. 146; 48 L. J. Ch. 252; *Macmanus* v. *Cooke*, 35 C. D. 698; 56 L. J. Ch. 669; *Von Joel* v. *Hornsey*, (1895) 2 Ch. 774; 65 L. J. Ch. 102; *Jordeson* v. *Sutton, etc., Gas Co.*, (1899) 2 Ch. 217; 68 L. J. Ch. 457; *Cowper* v. *Laidler*, (1903) 2 Ch. 341; 72 L. J. Ch. 578, 580; *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 193; 73 L. J. Ch. 492; *Higgins* v. *Betts*, (1905) 2 Ch. p. 217; 74 L. J. Ch. 624; *Kine* v. *Jolly*, (1905) 1 Ch. 495, 503, 504; 74 L. J. Ch. 188; and see *Jones* v. *Tankerville* (*Earl*), (1909) 2 Ch. p. 446; 78 L. J. Ch. 676.

(*q*) *Woodhouse* v. *Newry Navigation Co.*, (1898) 1 Ir. R. 161.

(*r*) *Jacomb* v. *Knight*, 3 De G. J. & S. 538; 32 L. J. Ch. 601; *Hepburn* v. *Lordan*, 2 H. & M. 345; 34 L. J. Ch. 293; *Grand Junction Canal Co.*

objection is not of itself a sufficient ground for the exercise of the jurisdiction, if the act is not a breach of a negative covenant, and the injury done can be properly compensated by a pecuniary sum (*s*).

A benefit resulting to the plaintiff through the act of the defendant, though it is no compensation for injury, may be taken into account in deciding whether an injunction or damages shall be granted (*t*). There is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before the commencement of the action (*u*). On an application for a mandatory injunction the Court will have regard to the character of the building sought to be removed, and if the building is one which can be removed without any great hardship being imposed on the defendant, may grant the mandatory order, though the building was erected and completed before action brought and without any complaint on the part of the plaintiff (*x*). Where there is a question as to whether the defendant's act is lawful or not, and the defendant has acted fairly, the Court should incline to awarding damages rather than to granting an injunction (*y*). The Court will seldom interfere to pull down a building which has been erected without complaint (*z*), nor will the Court, except

v. *Shugar*, 6 Ch. 489; *Krehl* v. *Burrell*, 7 C. D. 551; 11 C. D. 146; 48 L. J. Ch. 252; *Smith* v. *Day*, 13 C. D. 652; *Greenwood* v. *Hornsey*, 33 C. D. 471; 55 L. J. Ch. 917; *Parker* v. *Stanley*, (1902) 50 W. R. 283.

(*s*) *Isenberg* v. *East India House, etc., Co.*, 3 De G. J. & S. 263; 33 L. J. Ch. 392; *Senior* v. *Pawson*, L. R. 3 Eq. 335. As to breach of negative covenants, see note (*o*), *supra*.

(*t*) *National, etc., Plate Glass Assurance Co.* v. *Prudential Assurance Co.*, 6 C. D. p. 769; 46 L. J. Ch. 875.

(*u*) *Durell* v. *Pritchard*, 1 Ch. 244; 35 L. J. Ch. 223; *Kelk* v. *Pearson*, 6 Ch. 813; *Goodson* v. *Richardson*, 9 Ch. 221; 43 L. J. Ch. 490; *Smith* v. *Smith*, 20 Eq. 504; 44 L. J. Ch. 630; *Morris* v. *Grant*, 24 W. R. 55; *Lawrence* v. *Horton*, 59 L. J. Ch. 440; 38 W. R. 555; *Shiel* v. *Godfrey*, (1893) W. N. 115.

(*x*) *Baxter* v. *Bower*, 44 L. J. Ch. 625; see *Gaskin* v. *Balls*, 13 C. D. p. 329.

(*y*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 193; 73 L. J. Ch. p. 493; and see *Kine* v. *Jolly*, (1905) 1 Ch. p. 504; 74 L. J. Ch. p. 183.

(*z*) *Gaskin* v. *Balls*, 13 C. D. p. 329; *Curriers' Co.* v. *Corbett*, 4 De G. J. & S. 764.

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under very special circumstances, order a defendant to pull down a building which has been erected in breach of a covenant by his predecessor in title, the defendant being in no way responsible for the breach of covenant (*a*).

Delay.

A man who comes to the Court for a mandatory injunction should use due diligence in making the application. Mere delay will not be fatal to the application if no mischief is caused thereby to the defendant, and the delay does not exceed a reasonable period (*b*); but the right to a mandatory injunction is gone if there has been unreasonable delay, and mischief would be caused thereby to the defendant (*c*).

If a proper case be made out, a mandatory injunction may be granted against an agent (*d*).

Mandatory injunctions whether granted before hearing.

A mandatory injunction is not as a rule granted before the hearing (*e*), but where the case is clear and free from doubt, it may be had upon interlocutory application (*f*), especially if the act required to be done involves no serious outlay, nor any considerable alteration in the existing state of things (*g*).

Thus where a defendant on being served with notice of motion for an injunction hurried on his building, a mandatory injunction was granted on an interlocutory application (*h*). So also, where a defendant, knowing that a writ for an injunc-

(*a*) *Powell* v. *Hemsley*, (1909) 2 Ch. 252, 259; 78 L. J. Ch. 744.

(*b*) *Gale* v. *Abbott*, 8 Jur. N. S. 987; *Woodhouse* v. *Newry Navigation Co.*, (1898) 1 Ir. R. 161. See *Worcester College* v. *Oxford Canal Navigation*, (1912) 81 L. J. Ch. 1.

(*c*) *Senior* v. *Pawson*, L. R. 3 Eq. 335; *Gaunt* v. *Fynney*, 8 Ch. 14; 42 L. J. Ch. 122; *Smith* v. *Smith*, 20 Eq. 500; 44 L. J. Ch. 630; *Gaskin* v. *Balls*, 13 C. D. 328; *Worcester College* v. *Oxford Canal Navigation*, *supra*.

(*d*) *Cohen* v. *Poland*, (1887) W. N. 159.

(*e*) *Gale* v. *Abbott*, 8 Jur. N. S. 987; *Blakemore* v. *Glamorganshire Canal Co.*, 1 M. & K. 154; 2 L. J. (N. S.) Ch. 95; 36 R. R. 289; *Johnston* v. *Courts of Justice Chambers*, (1883) W. N. 5; *Bonner* v. *Great Western Railway Co.*, 24 C. D. 1.

(*f*) *Lane* v. *Newdigate*, 10 Ves. 192; 7 R. R. 381; *Bonner* v. *Great Western Railway Co.*, *supra*; *Hermann Loog* v. *Bean*, 26 C. D. 314, 315; 53 L. J. Ch. 1128; *Allport* v. *The Securities Co.*, 64 L. J. Ch. 491; 72 L. T. 533; *Collison* v. *Warren*, (1901) 1 Ch. 815, 816; 70 L. J. Ch. 382.

(*g*) *Hervey* v. *Smith*, 1 K. & J. 389, 392; 103 R. R. 141.

(*h*) *Daniell* v. *Ferguson*, (1891) 2 Ch. 27; and see *Parker* v. *Stanley*, (1902) 50 W. R. 283.

tion had been issued against him, evaded service and continued the works, a mandatory injunction was granted on interlocutory application in respect of so much of the building as had been erected between the issue and service of the writ (*i*).

Suspension of injunctions.

On granting a mandatory injunction, the Court may order that its operation be suspended until after a certain period (*k*).

Application for suspension.

Where the Court of Appeal has granted an injunction, but has suspended its application for a certain time, application for a further suspensio· should be made to the Court of first instance (*l*).

(*i*) *Von Joel* v. *Hornsey*, (1895) 2 Ch. 774; 65 L. J. Ch. 102.

(*k*) *Smith* v. *Smith*, 20 Eq. 500, 505; 41 L. J. Ch. 630, 633; *Att.-Gen.* v. *Colney Hatch*, 4 Ch. 146; *Shiel* v. *Godfrey*, (1893) W. N. 115; *Att.-Gen.* v. *Willesden District Council*, (1896) 12 T. L. R. 528; *Islington Vestry* v. *Hornsey Urban Council*, (1900) 1 Ch. p. 707; *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. 526, 544; 78 L. J. Ch. p. 8; *Att.-Gen.* v. *Gibb*, (1909) 2 Ch. 279; 78 L. J. Ch. 528; *Stancomb* v. *Trowbridge District Council*, (1910) 2 Ch. 191; 78 L. J. Ch. 519; *Tubbs* v. *Esser*, (1910) 26 T. L. R. 146; *Schweder* v. *Worthing Gas Light and Coke Co.*, (1912) 81 L. J. Ch. 102; *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 495, 509; 105 L. T. 701.

(*l*) *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 2 Ch. 388; 64 L. J. Ch. 736.

CHAPTER IV.

INJUNCTIONS AGAINST WASTE.

SECTION 1.—PRINCIPLES ON WHICH THE COURT ACTS IN RESTRAINING WASTE.

Injunctions restraining waste.

THE principles on which the Court acts in restraining waste by injunction are the same as those upon which it proceeds in other cases where its interposition is sought for the protection of legal rights (*a*). The jurisdiction is not, however, limited to cases where an action at law can be maintained, but extends to cases where, in consequence of the infirmity of legal process, there is neither a right nor a remedy at law, but only what the law in principle acknowledges to be a wrong (*b*). Thus, as early as the reign of King Richard the Second, an injunction was granted at the suit of a remainderman to stay waste by a tenant for life or for years, although the existence of an intermediate life estate formed a temporary impediment to an action at law (*c*).

If waste be of a trivial nature the Court will not interfere.

It is not necessary for a man to wait until a serious act of waste has been committed, before applying to the Court for its interference by injunction (*d*). But the Court will not interfere where the waste is trivial and of small extent (*e*), or where the person against whom relief is sought has stopped

(*a*) *Ante*, p. 16 *et seq.*

(*b*) *Emperor of Austria* v. *Day*, 3 De G. F. & J. p. 254, *per* Turner, L.J.; *Robinson* v. *Litton*, 3 Atk. p. 210; *Farrant* v. *Lovell*, ib. 723.

(*c*) Moore, 554; *Roswell's case*, 1 Roll. Ab. 377, pl. 13; *Farrant* v. *Lovell*, 3 Atk. 723.

(*d*) *Gibson* v. *Smith*, 2 Atk. 182; *Coffin* v. *Coffin*, Jac. 71; 23 R. R. 1.

(*e*) *Brace* v. *Taylor*, 2 Atk. 253; *Barry* v. *Barry*, 1 J. & W. 653; *Doran* v. *Carroll*, 11 Ir. Ch. 383; *Grand Canal Co.* v. *McNamee*, 29 L. R. Ir. 131; and see *Doherty* v. *Allman*, 3 A. C. p. 733; *Jones* v. *Chappell*, 20 Eq. p. 542; 44 L. J. Ch. 658; *Meux* v. *Cobley*, (1892) 2 Ch. p. 264; 61 L. J. Ch. p. 452; *West Ham Central Charity Board* v. *East London Waterworks Co.*, (1900) 1 Ch. pp. 635, 636; 69 L. J. Ch. 257, 262; *Hyman* v. *Rose*, (1912) A. C. 623; 81 L. J. K. B. 1062.

committing waste since the bringing of the action (*f*). If, however, an intention to commit further waste can be shown, the Court will interfere, though the first acts of waste may have been of a trivial nature (*g*); but where waste of one kind has been done or threatened, the injunction will not be extended to waste of another kind (*h*).

Prospective or threatened damage.

The Court has jurisdiction, if a fair case of prospective injury can be made out, to interfere before waste has been actually committed. If an intention to commit waste can be shown to exist, or if a man insists on his right or threatens to commit waste, there is a foundation for the exercise of the jurisdiction (*i*).

The words "on pain of forfeiture" after a prohibition against the commission of waste do not take away the rights and remedies which arise from the prohibition itself, but will be regarded as having been inserted merely as a more effectual means of enforcing the obligation (*k*).

Delay.

A man who comes to the Court for *an injunction* (*l*) against waste should use due diligence in making the application. Delay, however, is not so prejudicial to the plaintiff in cases of waste or trespass as in other applications for injunctions (*m*). In some cases indeed delay is not material. A man, for instance, who has been permitted to cut down half of the trees upon the land of another, can acquire no title from the negligence of the owner, to cut down the remaining half (*n*). Nor can tenants who have been in the habit of

(*f*) *Barry* v. *Barry*, 1 J. & W. 653. Cf. *Anon.*, 3 Atk. 485.

(*g*) *Coffin* v. *Coffin*, Jac. 71; 23 R. R. 1; *Barry* v. *Barry*, 1 J. & W. 653; *Doran* v. *Carroll*, 11 Ir. Ch. 383. As to when the Court will infer an intention to repeat the act complained of, see *Phillips* v. *Thomas*, 62 L. T. 793 (nuisance).

(*h*) *Coffin* v. *Coffin*, Jac. 72; 23 R. R. 1.

(*i*) *Gibson* v. *Smith*, 2 Atk. 182; *Coffin* v. *Coffin*, Jac. 71; 23 R. R. 1; *Barry* v. *Barry*, 1 J. & W. 653; *Campbell* v. *Allgood*, 17 Beav. 628; 99 R. R. 318; and see the Judicature Act, 1873, s. 25, sub-s. (8), as to granting injunctions in cases of "apprehended waste."

(*k*) *Blake* v. *Peters*, 1 De G. J. & S. 345; 32 L. J. Ch. 200.

(*l*) *Barry* v. *Barry*, 1 J. & W. 651. See *Bagot* v. *Bagot*, 32 Beav. 509; 33 L. J. Ch. 116.

(*m*) See *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 411; 80 L. J. Ch. p. 154.

(*n*) *Att.-Gen.* v. *Eastlake*, 11 Ha. 228; 90 R. R. 648, *per* Lord Hatherley.

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cutting turf or working quarries for many years acquire a title as against their landlord to continue to do so (*o*). Nor is a man who buys land used by tenants for making bricks, or who purchases land with notice that the land was being converted into a burying-ground, precluded from complaining of waste committed after the purchase (*p*). The case however is different if the tenant for life or lessee has been encouraged by the *acquiescence* of the reversioner or lessor to expend monies upon the property upon the faith and understanding that no obstacle will be afterwards thrown in the way of their enjoyment (*q*). In the case of mines the utmost promptitude in making the application is requisite (*r*).

SECTION 2.—LEGAL WASTE.

What is waste.

Waste is a substantial injury to the inheritance done by one having a limited estate either of freehold or for years during the continuance of his estate (*s*). The essential character of waste is, that the party committing it is in rightful possession, and that there is a privity of title between the parties (*t*).

The consequences of waste do not attach unless substantial damage is done to the inheritance (*u*), which may be either—

(*o*) *Lord Courtown* v. *Ward*, 1 Sch. & Lef. 8; *Elias* v. *Griffith*, 8 C. D. p. 525; 4 A. C. 454; 48 L. J. Ch. 811.

(*p*) *Cregan* v. *Cullen*, 16 Ir. Ch. 339.

(*q*) *Barry* v. *Barry*, 1 J. & W. 651. See *ante*, pp. 20—24.

(*r*) *Hilton* v. *Lord Granville*, Cr. & Ph. 283; 10 L. J. Ch. 398; 54 R. R. 297; *Parrott* v. *Palmer*, 3 M. & K. 635; 41 R. R. 149; *Clegg* v. *Edmondson*, 8 De G. M. & G. 808; 26 L. J. Ch. 246; 114 R. R. 279.

(*s*) Co. Litt. 53 a; 1 Cr. Dig. 115; see *Meux* v. *Cobley*, (1892) 2 Ch. 263; 61 L. J. Ch. p. 449; *West Ham Charity Board* v. *East London Waterworks Co.*, (1900) 1 Ch. p. 635; 69 L. J. Ch. 262; *Hyman* v. *Rose*, (1912) A. C. p. 632; 81 L. J. K. B. p. 1065.

(*t*) *Davenport* v. *Davenport*, 7 Ha. p. 222; 18 L. J. Ch. 163; 82 R. R. 76; *Lowndes* v. *Bettle*, 33 L. J. Ch. 451, 454.

(*u*) *Meux* v. *Cobley*, (1892) 2 Ch. 253; 61 L. J. Ch. 449; *West Ham Charity Board* v. *East London Waterworks Co.*, (1900) 1 Ch. pp. 635, 636; 69 L. J. Ch. p. 262. See *Edmund* v. *Martell*, (1907) 24 T. L. R. 25; *Hyman* v. *Rose*, *supra*.

1st, by diminishing the value of the estate; 2ndly, by increasing the burdens upon it; or 3rdly, by impairing the evidence of title (*x*). An act which increases the value of an estate may nevertheless be waste if it impairs the evidence of title (*y*), or increases the burdens on the property (*z*). The owner of the inheritance has a right (subject to certain statutory modifications (*z*)) to require that the nature and character of the property shall not be changed by the owner of the limited estate to the injury of the inheritance (*a*). Waste which increases the value of property is called meliorating waste (*b*). To obtain an injunction on the ground of waste, a plaintiff must prove that the acts of the defendant are prejudicial to the inheritance (*c*).

Meliorating waste.

Waste is either voluntary or permissive (*d*). Voluntary waste consists in the commission of acts which the owner of the limited estate has no authority to do, such as cutting timber, pulling down or substantially altering (*e*) buildings. Permissive waste arises from the omission of acts which it is his duty to do, as, for example, permitting buildings to go to decay by neglecting to repair them (*f*).

Waste either voluntary or permissive.

(*x*) *Doe* v. *Earl of Burlington*, 5 B. & Ad. 507, 517; 3 L. J. (N. S.) K. B. 26; 39 R. R. 549; *Huntley* v. *Russell*, 13 Q. B. 572, 588; 18 L. J. Q. B. 239; 78 R. R. 451; *Jones* v. *Chappell*, 20 Eq. 539; 44 L. J. Ch. 658; *West Ham Charity Board* v. *East London Waterworks Co.*, (1900) 1 Ch. 624, 636; 69 L. J. Ch. 257, 262.

(*y*) *Simmons* v. *Norton*, 7 Bing. 648; 9 L. J. (O. S.) C. P. 185; *Duke of St. Albans* v. *Skipwith*, 8 Beav. 357; 14 L. J. Ch. 248; but see *Doherty* v. *Allman*, 3 A. C. p. 735.

(*z*) See *infra*, Sect. 6.

(*a*) *West Ham Charity Board* v. *East London Waterworks Co.*, (1900) 1 Ch. 624; 69 L. J. Ch. 257. But see *Hyman* v. *Rose*, *supra*.

(*b*) 2 Wms. Saund. 259; *Duke of Leeds* v. *Amherst*, 2 Ph. 123; 15 L. J. Ch. 351; 78 R. R. 47; *Coppinger* v. *Gubbins*, 3 J. & L. 417; 72 R. R. 81; *Doherty* v. *Allman*, 3 A. C. 729, 734. See *Meux* v. *Cobley*, (1892) 2 Ch. 253; 61 L. J. Ch. 449; *Edmund* v. *Martell*, (1907) 24 T. L. R. 25.

(*c*) *Doherty* v. *Allman*, 3 A. C. p. 734; *Meux* v. *Cobley*, (1892) 2 Ch. 253, 263; 61 L. J. Ch. p. 452; *Re McIntosh and Pontypridd Improvements Co.*, 61 L. J. Q. B. 164; *Grand Canal Co.* v. *McNamee*, 29 L. R. Ir. 131; see *Hyman* v. *Rose*, *supra*.

(*d*) As to whether there is any liability for permissive waste, see *post*, p. 65.

(*e*) See *Hyman* v. *Rose*, *supra*.

(*f*) Co. Litt. 53 a; *White* v. *M'Cann*, 1 Ir. C. L. 205; *Young* v. *Spencer*, 10 B. & C. 145.

Waste at common law punishable only in certain cases.

At common law waste was punishable only in the case of tenant in dower, tenant by the courtesy, and guardian. These estates being the creation of law, the law annexed to them the condition that waste should be neither done nor permitted. A tenant for life or for years was not at common law liable for waste in the absence of an express stipulation to that effect in the instrument by which his estate was created. An estate for life being not the creation of the law, but of the parties to the instrument, the law would not imply a condition against waste in cases where no provision to that effect was made (*g*). This defect in the law was remedied by the Statutes of Marlbridge, 52 Hen. 3, c. 23, and Gloucester, 6 Edw. 1, c. 5, which enabled the writ of waste which lay at common law to be issued against tenants for life and tenants for years.

Waste in trees.

Timber trees are parcel of the inheritance. A tenant for life or years, or other owner of a limited estate, has only a right to their shade and fruit during the continuance of his estate (*h*). It is waste if he cuts them down, or does any act to impair their value or cause them to decay (*i*). The cutting of timber which is overripe may be waste (*k*).

What trees are timber.

Timber trees are such as are useful for the purpose of building. Ash, oak, and elm, of the age of twenty years and upwards, are timber in all places (*l*), and by the custom of different counties, other trees, such as birch, beech, walnut, whitethorn, willow, blackthorn, hornbeam, etc., are timber (*m*).

Waste—when committed by cutting down trees which are not timber.

The cutting of many sorts of trees, which are not otherwise timber, as hornbeams, hazels, willows, sallows, etc., etc., may, from the situation in which they are placed, be considered

(*g*) 2 Inst. 145, 299; *Green* v. *Cole*, 2 Wms. Saund. 252.

(*h*) 4 Co. Rep. 62 b; 11 Co. Rep. 50 a; 1 Roll. Ab. 181.

(*i*) Co. Litt. 53 a.

(*k*) *Perrott* v. *Perrott*, 3 Atk. 95; *Seagram* v. *Knight*, 2 Ch. 628; see now, however, 40 & 41 Vict. c. 18, s. 16; and 45 & 46 Vict. c. 38, s. 35.

(*l*) Co. Litt. 53 a; 2 Roll. Ab. 814; Dyer, 65 a.

(*m*) Co. Litt. 53 a; *Duke of Chandos* v. *Talbot*, 2 P. Wms. 606; *Honywood* v. *Honywood*, 18 Eq. 306; 43 L. J. Ch. 652; *Dashwood* v. *Magniac*, (1891) 3 Ch. 306; 60 L. J. Ch. 809; *Pardoe* v. *Pardoe*, (1900) 82 L. T. 547; Cruise, Dig. tit. 3, ch. 2, ss. 5—7.

waste, as if they support a bank, or grow within the site of or shelter a house, or are used as shelter by cattle (*n*).

Trees planted as an improvement under Settled Land Acts.

Where trees have been planted as an improvement under the Settled Land Acts, the tenant for life and his successors in title having under the settlement a limited estate or interest only in the settled land, are not entitled to cut down any of such trees except in proper thinning (*o*).

Trees not timber.

It is not waste to cut down trees which are not timber either by law or custom, or from the situation in which they are placed, unless some special prejudice arises thereby to the inheritance (*p*). Nor is the cutting down of oak, ash, and elm trees under twenty years of age waste, provided they are cut down for the purpose of allowing the proper development and growth of other timber in the same wood or plantation (*q*). But the cutting down of trees which being under twenty years of age are not timber, but which would be timber if they were over twenty years of age, is waste, provided it be not done for the purpose of improving the other trees (*r*).

Oak, ash, elm, under twenty years of age.

Exception in the case of timber estates.

The general rules with respect to waste in timber are subject to exceptions in the case of what are called timber estates (*s*), that is to say, "estates the trees on which, though timber, may, by virtue of a local usage, be cut periodically when grown in woods, with a view to secure a succession of timber and to preserve such woods" (*t*).

Underwood and coppice.

It is not waste to cut hedges, bushes, and underwood, and even oaks and ashes which have been usually cut as underwood, provided the cutting be done in a reasonable and husbandlike manner, and so as not to eradicate or destroy the

(*n*) Co. Litt. 53 a; *Phillipps* v. *Smith*, 14 M. & W. 593.

(*o*) Settled Land Act, 1882, s. 28 (2).

(*p*) Co. Litt. 53 a; *Barrett* v. *Barrett*, Het. 36; *Phillipps* v. *Smith*, 14 M. & W. 589.

(*q*) *Pidgeley* v. *Rawling*, 2 Coll. 275; *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 656; *Honywood* v. *Honywood*, 18 Eq. 309; 43 L. J. Ch. 654.

(*r*) *Honywood* v. *Honywood*, 18 Eq. 310; 43 L. J. Ch. 655; see *Lowndes* v. *Norton*, (1876) W. N. 221.

(*s*) *Ferrand* v. *Wilson*, 4 Ha. 375; 15 L. J. Ch. 41; 67 R. R. 70; *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & S. 75; *Honywood* v. *Honywood*, 18 Eq. 310; 43 L. J. Ch. 652; and see the Settled Land Act, 1882, s. 35.

(*t*) *Dashwood* v. *Magniac*, (1891) 3 Ch. p. 357; 60 L. J. Ch. p. 825.

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germens or prevent their future growth (*u*). Nor is it waste to cut timber where the underwood is the most important part of the produce, and the cutting of timber is necessary for its growth (*x*).

Dead trees.

It seems that it is not waste to fell trees which are completely dead and bear neither fruit nor leaves (*y*), and have not sufficient timber in them for buildings or posts (*z*).

Exception of trees.

Trees which have been excepted out of a demise may not be cut down by the tenant (*a*). An exception of trees generally applies only to timber trees, and not to apple or other fruit trees, or the like (*b*). Where the exception was of timber and other trees, but not the annual fruit thereof, it was held that apple trees were not within it, because it was to be construed strictly against the lessor (*c*).

Rights of copyholder in timber.

A copyholder, being considered in law to be a tenant at will, has in general the same possessory interest in the trees as he has in the land. Apart from special custom, he cannot cut down trees or do any other act to the injury of the freehold except with the lord's concurrence (*d*). But by custom a copyholder of inheritance, or a copyholder for life, with power to renew and nominate his successor, may have the right to fell timber upon his tenement and retain the same for his own use (*e*). The lord cannot, any more than the copyholder, cut down trees upon the tenement of a copyholder, without a custom authorising him to do so (*f*).

(*u*) Co. Litt. 53 a; *Brydges* v. *Stephens*, 6 Madd. 279; 23 R. R. 217; *Humphreys* v. *Harrison*, 1 J. & W. 581; 14 L. J. Ex. 254; 21 R. R. 238; *Pidgeley* v. *Rawling*, 2 Coll. 275; 70 R. R. 220; *Phillipps* v. *Smith*, 14 M. & W. 589; *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 656.

(*x*) *Knight* v. *Duplessis*, 2 Ves. 361

(*y*) Co. Litt. 53 a; 2 Roll. Ab. 814.

(*z*) *Manwood's case*, Moor. 101, Dyer, 322.

(*a*) *Goodright* v. *Vivian*, 8 East, 190. See *Legh* v. *Heald*, 1 B. & A. 622; 9 L. J. K. B. 98; 35 R. R. 402; *Doe* dem. *Douglas* v. *Lock*, 2 A. & E. 705; 4 L. J. (N. S.) K. B. 113; 41 R. R. 496; *Doe* v. *Price*, 8 C. B. 894; 19 L. J. C. P. 121; 79 R. R. 803.

(*b*) *Wyndham* v. *Way*, 4 Taunt. 316; 13 R. R. 607.

(*c*) *Bullen* v. *Denning*, 5 B. & C. 842; 4 L. J. K. B. 314; 29 R. R. 431.

(*d*) *Eardley* v. *Lord Granville*, 3 C. D. p. 832.

(*e*) *Blewett* v. *Jenkins*, 12 C. B. N. S. 16.

(*f*) *Whitechurch* v. *Holdworthy*, 19 Ves. 212; 16 R. R. 481.

"As regards trees in an ordinary copyhold," said Jessel, M.R., in *Eardley* v. *Lord Granville* (*g*), the property remains in the lord, but in the absence of custom, he cannot cut them down. The possession is in the copyholder; the property is in the lord. If a stranger cuts down the trees, the copyholder can maintain trespass against the stranger, and the lord can maintain trover for the trees. If the lord cuts down the trees, the copyholder can maintain trespass against the lord; but if the copyholder cuts down the trees, irrespective of the question of forfeiture, the lord can bring an action against the copyholder."

Estovers.

A tenant for life or for years has the right to cut timber by way of estovers for the necessary repairs of the house and principal buildings, the fences, gates, and agricultural implements. If there is no underwood, he may also cut, or at least lop, timber for the purpose of firewood (*h*). He has this privilege of common right, but the estovers must be reasonable (*i*). The right to estovers attaches as a right to the particular estate on which they have been taken. Estovers cut on one estate cannot be used on another (*k*). A tenant for life or for years may cut timber to repair houses which he is not strictly bound to repair (*l*), but he may not cut timber to make new fences or to build new houses, or to repair houses which he has wasted or suffered to be wasted (*m*). Nor can he cut timber for the purpose of working mines (*n*). The cutting of timber which is not fit for repairs (*o*), or the cutting

(*g*) 3 C. D. p. 832; 45 L. J. Ch. 672.

(*h*) *Manwood's case*, Moor. 101; 2 Roll. Ab. 823; Co. Litt. 41 b; Vin. Ab. Waste; Com. Dig. Waste; Craig on Trees, 4; see *Howley* v. *Jebb*, 8 Ir. C. L. 435. See, as to covenant by lessee to repair, "having or taking sufficient housebote, and without committing waste," *Dean and Chapter of Bristol* v. *Jones*, 1 El. & El. 484; 28 L. J. Q. B. 201: 117 R. R. 298.

(*i*) Co. Litt. 41 b.

(*k*) *Lee* v. *Alston*, 1 Bro. C. C. 194; 3 Bro. C. C. 37; 1 Ves. Jr. 78; *Nash* v. *Earl of Derby*, 2 Vern. 537.

(*l*) Co. Litt. 54 b.

(*m*) Co. Litt. 53 b; 2 Roll. Ab. 815; *Darcy* v. *Askwith*, Hob. 234. See the Settled Land Act, 1882, ss. 29 and 35, *infra*, Chap. IV., Sect. 6, as to right of a tenant for life to cut timber for executing authorised improvements, and timber ripe for cutting.

(*n*) *Darcy* v. *Askwith*, *supra*.

(*o*) *Simmons* v. *Norton*, 7 Bing. 648; 9 L. J. C. P. 185; 33 R. R. 588.

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of more timber than is necessary for repairs (*p*), is waste. But if timber be cut down *bonâ fide* for the purpose of being used in repairs, the tenant is justified, though he may have over-calculated the quantity required (*q*). The timber cut must be applied specifically towards the actual repairs for which it has been cut. It cannot be sold for the purpose of raising money for the purchase of other timber (*r*), or for the purpose of defraying the expenses of past or contemplated repairs (*s*); nor can it be exchanged for other timber better adapted for the repairs in question (*t*).

Estovers.

Timber may not be cut for the purpose of firewood as long as there is any dry or decayed wood or underwood on the land (*u*).

A copyholder is entitled to estovers by custom, and it would appear that he is entitled to them of common right even without a custom (*x*).

The committee of a lunatic's estate may cut timber for repairs as a prudent owner would do (*y*).

Waste in gardens and orchards.

The cutting of fruit trees growing in a garden or orchard is waste, unless they have been torn up by the wind (*z*). But it is not waste to cut fruit trees which do not grow in a garden or orchard, but grow scatteringly on divers places of the land (*a*). The ploughing up a strawberry-bed before it is exhausted has been held to be waste (*b*).

It is waste if the tenant of a dove-house, warren, park, fish-

(*p*) Co. Litt. 53 b. See as to tenants for ..., S. L. Act, 1882, s. 29.

(*q*) *East* v. *Harding*, Cro. Eliz. 498; *Doe* v. *Wilson*, 11 East, 56.

(*r*) Co. Litt. 53 b; *Lewis Bowle's case*, 11 Co. Rep. 82 a; *Simmons* v. *Norton*, 7 Bing. 648; 9 L. J. C. P. 185; 33 R. R. 588.

(*s*) *Gorges* v. *Stanfield*, Cro. Eliz. 593; *Lee* v. *Alston*, 1 Bro. C. C. 194; 3 Bro. C. C. 37; *Gower* v. *Eyre*, Coop. 156.

(*t*) *Att.-Gen.* v. *Stawell*, 2 Anst. p. 601.

(*u*) 2 Roll. Ab. 820, pl. 9; Co. Litt. 53 b; Cruise, Dig. 80; *Cole* v. *Peyson*, 1 Ch. Ca. 106.

(*x*) *Heydon's case*, 13 Co. Rep. 67.

(*y*) *Ex parte Ludlow*, 2 Atk. 407.

(*z*) Co. Litt. 53 a; *Littler* v. *Thompson*, 2 Beav. 129; 50 R. R. 124. See the Agricultural Holdings Act, 1908, 8 Edw. 7, c. 28, s. 42 (1) (iii.); and the Small Holdings and Allotments Act, 1908, 8 Edw. 7 c. 36, s. 47, as to removal of fruit trees.

(*a*) Bro. Ab. Waste, pl. 143.

(*b*) *Watherell* v. *Howells*, 1 Camp. 227.

pond, or the like take so many of the animals that the perpetuity of succession is destroyed (*c*); or suffer the pale of the park to decay so that the deer escape, or permit the banks of the fish-pond to get out of repair so that the fish escape or the pond dries up (*d*). If the lessee of a warren by charter or prescription plough up the land, it is waste (*e*), but it is otherwise if it be only land stored with conies and not a legal warren; and stopping up and digging cony burrows is not waste in a warren (*f*). Deer in a lawful park are part of the inheritance: it is waste in a tenant for life to do anything to sever the deer from the inheritance; and it seems that reclaiming deer is an act of waste, because it makes them no longer venison in a park, but chattels like any other domesticated animals (*g*).

Waste in parks, ponds, warrens, etc.

It is waste if a tenant for life or for years dig for clay, gravel, lime, brick, earth, minerals, stones, or the like (*h*). If there be a grant of lands, or of lands and mines expressly, he may dig and take the profits of mines, gravel pits, or clay pits, open at the time of the grant, or which a preceding tenant in tail under the settlement, or other person rightfully entitled to open, may have opened, but he may not open new ones (*i*). Nor does a power to lease with the mines land on

Waste in mines, etc.

(*c*) Co. Litt. 53 b; Hob. 234; *Vavasour's case*, 2 Leon. 222; *Anon.*, 4 Lev. 240; *Kimpton* v. *Eve*, 2 V. & B. 349; 13 R. R. 116. See *Maynard* v. *Gibson*, (1876) W. N. 204, for declaration that tenant for life was not entitled to deer and pigeons absolutely, but only to their reasonable enjoyment.

(*d*) Co. Litt. 53 a; Hob. 234; *Bathurst* v. *Burden*, 2 Bro. C. C. 64.

(*e*) Co. Litt. 53 b; *Angerstein* v. *Hunt*, 6 Ves. 487.

(*f*) *Lurting* v. *Conn*, 1 Ir. Ch. 273.

(*g*) *Ford* v. *Tynte*, 2 J. & H. 153; 31 L. J. Ch. 180, *per* Wood, V.-C.

(*h*) Bro. Ab. Waste, pl. 93; Co. Litt. 53 b; 2 Roll. Ab. 816. See, however, now as to the powers of a tenant for life, S. L. Act, 1882, s. 29.

(*i*) Co. Litt. 54 b; *Saunders' case*, 5 Co. Rep. 12 a; *Viner* v. *Vaughan*, 2 Beav. 469; 50 R. R. 245; *Huntley* v. *Russell*, 13 Q. B. 591; 18 L. J. Q. B. 239; 78 R. R. 451; *Bagot* v. *Bagot*, 32 Beav. 509; 33 L. J. Ch. 118; *Clegg* v. *Rowland*, L. R. 2 Eq. 160; 35 L. J. Ch. 396; *Dashwood* v. *Magniac*, (1891) 3 Ch. p. 360; 60 L. J. Ch. 831; *Maynard's Settled Estates*, (1899) 2 Ch. 352; 68 L. J. Ch. 611. See as to whether mines are open or not, *Elias* v. *Snowdon Slate Quarries*, 4 A. C. p. 465; 48 L. J. Ch. 818; *Re Maynard*, (1899) 2 Ch. 347; 68 L. J. Ch. 609; *Re Chaytor*, (1900)

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which there are both open and unopened mines authorise a lease of unopened mines (*k*).

As a tenant for life is entitled to continue the working of mines which were open at the time he came in, so he may use all means necessary for working them. He may, if it can be done without any special damage to the inheritance, sink new shafts and pits to follow the same vein of coal (*l*), or to reach new seams lying under the old seams (*m*). But it is doubtful whether he has a right to open pits or mines which have been abandoned, or the preparations for opening which have not been completed. The question must always depend on the circumstances of each particular case (*n*).

The rule that a tenant for life may continue the working of open mines, gravel or clay pits, extends to the case of quarries of slate or limestone, which have been worked by the owner of the inheritance for the purpose of making a profit; but it seems that the rule does not apply to cases where stone or slate has been dug out of a quarry for the purpose of building or repairing houses on the property, and not for the purpose of profit (*o*).

The reservation of minerals includes all reasonable means of getting them (*p*).

2 Ch. 804; 69 L. J. Ch. 837; *Greville-Nugent* v. *Mackenzie*, (1900) A. C. 83; 69 L. J. P. C. 1. See as to working gravel pits so as to destroy the surface, *Ellis* v. *Bromley Local Board*, 45 L. J. Ch. 763, (1876) W. N. 156.

(*k*) *Clegg* v. *Rowland*, L. R. 2 Eq. 160; 35 L. J. Ch. 396; *In re Baskerville*, (1910) 2 Ch. 329; 79 L. J. Ch. 687; *In re Daniels*, (1912) 2 Ch. 90; 81 L. J. Ch. 509.

(*l*) *Whitfield* v. *Bewit*, 2 P. Wms. 240; *Clavering* v. *Clavering*, ib. 388; *Viner* v. *Vaughan*, 2 Beav. 469; 50 R. R. 245; *Elias* v. *Snowden Slate Quarries*, 4 A. C. 466; 48 L. J. Ch. 811, *per* Lord Selborne; *Dashwood* v. *Magniac*, (1891) 3 Ch. p. 361; 60 L. J. Ch. 831; see *In re Maynard's Settled Estate*, (1899) 2 Ch. 351; 68 L. J. Ch. 609; *Re Chaytor*, (1900) 2 Ch. 804; 69 L. J. Ch. 837.

(*m*) *Spencer* v. *Scurr*, 31 Beav. 334; 31 L. J. Ch. 808.

(*n*) *Viner* v. *Vaughan*, 2 Beav. 469; 50 R. R. 245; *Bagot* v. *Bagot*, 32 Beav. 509, 516; 33 L. J. Ch. 116; *Clinch* v. *Depson*, 78 L. T. Jo. 321; *Re Chaytor*, (1900) 2 Ch. 804; 69 L. J. Ch. 837. As to what is an opened mine see *Chaytor* v. *Trotter*, (1902) 87 L. T. 33.

(*o*) *Elias* v. *Snowdon Slate Quarries*, 4 A. C. 465; 48 L. J. Ch. 811.

(*p*) *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197; 26 R. R. 313; *Proud* v. *Bates*, 34 L. J. Ch. 411; *Harris*

Reservation and exception of minerals.

A reservation of "minerals" includes every substance which can be got from underneath the surface of the earth, whether by mining or quarrying, for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning (*q*). The test, however, is not whether the substances in question can be worked at a market profit at the time, but whether they have a use and a value independent of and separate from the rest of the soil (*r*). A reservation of mines and minerals in a farming lease does not indicate an intention to exclude a custom of the country for tenants to remove and sell flints which come to the surface in the ordinary course of agricultural operations so as to deprive the tenant of this right (*s*).

Estovers of gravel, clay, and minerals.

A tenant for life or years may take reasonable estovers of gravel and clay for the repairs of buildings, although the pits were not open at the date of the grant or demise (*t*). There may be also estovers of brick earth, lime, or the like, for the reparation of buildings or manuring the land (*u*). So also may there be estovers of coal (*x*). If there are open quarries of limestone on the land, the tenants may work them for estovers (*y*).

A tenant for life or years of land comprising turves has

v. *Ryding*, 5 M. & W. 60; 8 L. J. (N. S.) Ex. 181; 52 R. R. 632; *Goold* v. *Great Western Deep Coal Co.*, 2 De G. J. & S. 600; *Mordue* v. *Dean and Chapter of Durham*, L. R. 8 C. P. 3[illegible] L. J. C. P. 114; *Hayles* v. [illegible]*d Partners, Ltd.*, [illegible]09) 1 [illegible] 68 L. J. Ch. 222; and see [illegible]*ville* v. *Kennedy*, (1907) 1 [illegible]256; 76 L. J. Ch. 162.

(*q*) *Hext* v. *Gill*, 7 Ch. 699; 41 L. J. Ch. 761; and see *Great Western Railway Co.* v. *Blades*, (1901) 2 Ch. 624, 631; 70 L. J. Ch. 847; *Lord Provost of Glasgow* v. *Fairie*, 13 A. C. 657, 669; 58 L. J. P. C. 33; *Staples* v. *Young*, (1908) 1 Ir. R. 135; *Skey & Co.* v. *Parsons*, (1909) 101 L. T. 103; *North British Railway Co.* v. *Budhill Coal Co.*, (1910) A. C. 131, 134; 79 L. J. P. C. 31; *Barnard Stearns Oil Co.* v. *Farquharson*, (1912) A. C. 864; 107 L. T. 332.

(*r*) *Earl of Jersey* v. *Neath Union*, 22 Q. B. D. 562; 58 L. J. Q. B. 577, *per* Bowen, L.J.; *Johnstone* v. *Crompton & Co.*, (1899) 2 Ch. 190, 197; 68 L. J. Ch. 559, 562; see *Skey & Co.* v. *Parsons*, *supra*.

(*s*) *Tucker* v. *Linger*, 21 C. D. 36; 8 A. C. 508; 52 L. J. Ch. 941.

(*t*) 2 Roll. Ab. 816.

(*u*) Co. Litt. 53 b, 54 b; *Saunders' case*, 5 Co. Rep. 12 a.

(*x*) 2 Roll. Ab. 816.

(*y*) *Purcell* v. *Nash*, 1 Jones, 625; *Mansfield* v. *Crawford*, 9 Ir. Eq. 271.

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Turbary.

a right to cut by way of estovers as many turves as may be reasonably sufficient for consumption on the premises by way of firebote (*z*), but he may not cut turves for the purposes of sale (*a*), for the right of turbary can only exist as being a right in respect of an ancient dwelling-house or building (*b*), or for a new house, erected in continuance of the ancient house, provided no greater burden is imposed upon the servient land (*c*).

Interest of copyholder in mines, clay, gravel, etc.

A copyholder, whether of inheritance or for life, or for years only, has the same possessory interest in mines as he has in trees (*d*). By custom a copyholder of inheritance may have the right to break the surface and dig gravel, sand, and clay, without stint, from out of his own tenement for the purposes of sale off the manor (*e*). So also may a customary tenant have the right by custom to work mines for profit on his own copyhold tenement (*f*). But in the absence of custom the tenant cannot, without the leave of the lord, open or work new mines or work quarries upon his own tenement, nor on the other hand can the lord, in the absence of a custom, open and work mines upon the tenement of a copyholder (*g*).

If a stranger takes the minerals, the copyholder can bring trespass against the stranger for interfering with his possession, and the lord may bring an action against the stranger to

(*z*) *De Salis* v. *Crossan*, 1 Ba. & Be. 188; 12 R. R. 12; *Lord Courtown* v. *Ward*, 1 Sch. & Lef. 8; *Howley* v. *Jebb*, 8 Ir. C. L. 435.

(*a*) *Coppinger* v. *Gubbins*, 3 J. & L. 410; 72 R. R. 81; *Howley* v. *Jebb*, 8 Ir. C. L. 435; *Wakefield* v. *Hendron*, 11 L. R. Ir. 505.

(*b*) *Warwick* v. *Queen's College, Oxford*, L. R. 6 Ch. p. 730; *Att.-Gen.* v. *Reynolds*, (1911) 2 K. B. 888, 920; 80 L. J. K. B. 1073. See, as to grants of turbary, *Hill* v. *Barry*, Hayes & J. 688; *Hargrove* v. *Congleton*, 12 Ir. C. L. 362, 368.

(*c*) *Att.-Gen.* v. *Reynolds*, *supra*.

(*d*) *Eardley* v. *Lord Granville*, 3 C. D. 832; 45 L. J. Ch. 872; see *Bowser* v. *Maclean*, 2 De G. F. & J. 415; 30 L. J. Ch. 273.

(*e*) *Marquis of Salisbury* v. *Gladstone*, 9 H. L. C. 692; 34 L. J. C. P. 222; *Hanmer* v. *Chance*, 4 De G. J. & S. 626; 34 L. J. Ch. 413; see *Heath* v. *Deane*, (1905) 2 Ch. 86; 74 L. J. Ch. 466.

(*f*) *Bishop of Winchester* v. *Knight*, 1 P. Wms. 406; *Parrott* v. *Palmer*, 3 M. & K. 632; 41 R. R. 149; *Duke of Portland* v. *Hill*, L. R. 2 Eq. 765; 35 L. J. Ch. 439; see *Heath* v. *Deane*, *supra*; *Inland Revenue Commissioners* v. *Joicey*, (1913) 2 K. B. p. 586; 82 L. J. K. B. p. 787.

(*g*) *Bishop of Winchester* v.

Right of lord to minerals in copyholds.

recover the minerals (*h*). The right of the lord of a manor to minerals is a right of property to the mineral substance only, subject to which the copyholder has an estate in the soil throughout. If the lord has removed minerals, the space left belongs to the copyholder (*h*).

The lord of a manor, in the absence of custom, is entitled to every substance which can be got underneath the surface of the earth in a copyhold tenement for the purpose of profit (*i*). Although in the case of copyholds the property in the mines and minerals is in the lord, the concurrence of the tenant is necessary, as a rule, in order that the minerals may be worked (*k*), and accordingly a copyholder may obtain an injunction against the lord entering and digging for minerals under his tenement (*l*). It seems open to question, however, whether the lord is not free to work the minerals without the concurrence of the tenant, provided that he does so by underground workings and without entering upon or interfering with the surface (*m*).

Right of lord of manor to take gravel, &c., in the waste of the manor.

The lord of a manor may take gravel, marl, loam, turves, etc., in the waste of the manor, so long as he does not infringe upon the rights of the commoners. His right exists by reason of his ownership of the soil, and is quite independent of the right of approvement under the Statute of Merton or at common law. There is no ground of distinction between the lord's "digging and cutting" simply, and "digging and

Knight, 1 P. Wms. 406; *Grey* v. *Duke of Northumberland*, 13 Ves. 236; 17 Ves. 281; *Bourne* v. *Taylor*, 10 East, 189; 10 R. R. 267; *Cuddon* v. *Morley*, 7 Ha. 204; 82 R. R. 65; *Duke of Portland* v. *Hill*, L. R. 2 Eq. 765; 35 L. J. Ch. 439; *Eardley* v. *Lord Granville*, 3 C. D. 832; 45 L. J. Ch. 669; *Att.-Gen.* v. *Tomline*, 5 C. D. 750; 46 L. J. Ch. 654; *Inland Revenue Commissioners* v. *Joicey*, *supra* (*f*).

(*h*) *Eardley* v. *Lord Granville*, 3 C. D. p. 833; 45 L. J. Ch. 672.

(*i*) *Att.-Gen.* v. *Tomline*, 5 C. D. 762; 46 L. J. Ch. 654; 15 C. D. 150; *Hext* v. *Gill*, 7 Ch. 712; 41 L. J. Ch. 761.

(*k*) *Hext* v. *Gill*, 7 Ch. 712; 41 L. J. Ch. 763; *Eardley* v. *Lord Granville*, 3 C. D. 832; 45 L. J. Ch. 672; *Inland Revenue Commissioners* v. *Joicey*, *supra* (*f*).

(*l*) *Att.-Gen.* v. *Tomline*, 5 C. D. 750; 46 L. J. Ch. 654; *Inland Revenue Commissioners* v. *Joicey*, *supra* (*f*).

(*m*) See *Bowser* v. *Maclean*, 2 De G. F. & J. 415; 30 L. J. Ch. 273; *Inland Revenue Commissioners* v. *Joicey*, *supra* (*f*).

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cutting for purposes of sale." The burthen of proving that he avails himself unduly of this right lies on the tenants. In the case of approvement the *onus probandi* is on the lord, upon the ground that the lord having made a grant over the whole waste, his right to inclose is treated as a right conditional upon his establishing that he has left sufficient to enable the tenants to enjoy the right of common granted (*n*).

Waste by alteration of character of land.

Any permanent alteration of the character of land, such as the conversion of meadow into arable land by ploughing it up, or arable land into wood, or a meadow into an orchard, is waste, even although the value of the land be increased, because it not only changes the course of husbandry, but affects the proof of title (*o*). But a mere temporary alteration in the ordinary and reasonable course of husbandry is not waste (*p*). The enclosure and cultivation of waste land has been held to be waste by reason of the injury to the evidence of title (*q*).

Waste by bad cultivation of land.

By the general law a tenant for life or for years is under no obligation to cultivate land. It is not waste to suffer arable ground to lie fresh and not manured, so that it grows full of thorns: it is merely bad husbandry (*r*). To oblige a man to cultivate according to good husbandry, there must be either an

(*n*) *Hall* v. *Byron*, 4 C. D. 667; 46 L. J. Ch. 297; *Robertson* v. *Hartopp*, 43 C. D. 484, 499; 59 L. J. Ch. 553.

(*o*) Co. Litt. 53 *b*; *Lord Darcy* v. *Askwith*, Hob. 234; *Worsley* v. *Stewart*, 4 Bro. P. C. 377; *Simmons* v. *Norton*, 7 Bing. 647; 9 L. J. C. P. 185; 33 R. R. 588; *Goring* v. *Goring*, 3 Sw. 661; *Tucker* v. *Linger*, 21 C. D. 18; 51 L. J. Ch. 713; *West Ham Central Charity Board* v. *East London Waterworks Co.*, (1900) 1 Ch. 624; 69 L. J. Ch. 257; but see *Doherty* v. *Allman*, 3 A. C. p. 735; *Meux* v. *Cobley*, (1892) 2 Ch. 253, 264; and *Rush* v. *Lucas*, (1910) 1 Ch. 437; 79 L. J. Ch. 172; *Pemberton* v. *Cooper*, (1913) 107 L. T. 716; and see the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 46, 48, and Sched. I., Part I., to the Act.

(*p*) 2 Roll. Ab. 814; Viner, Ab. tit. Waste; *Malevrer* v. *Spinke*, Dyer, 37 a; *Simmons* v. *Norton*, 7 Bing. 647; 9 L. J. C. P. 185; 33 R. R. 588; Cruise, Dig. tit. iii. c. 2, s. 19; and see *Rush* v. *Lucas*, (1910) 1 Ch. 437; 79 L. J. Ch. 172.

(*q*) *Queen's College* v. *Hallett*, 14 East, 489; 13 R. R. 293. See observations on this case in *West Ham Charity* v. *East London Waterworks Co.*, *supra* (*o*).

(*r*) Bro. Ab. Waste, pl. 5; 2 Roll. Ab. 814; *Hutton* v. *Warren*, 1 M. & W. 472; 5 L. J. (N. S.) Ex. 234; 46 R. R. 368.

express contract or a custom of the country (*s*). A custom of the country need not have existed from time immemorial, as must a custom properly so called. It is sufficient if there be a general usage applicable to farms in the part of the country in which the land is situated (*t*). The mere relation of landlord and tenant creates an implied obligation on the part of the tenant to manage and use a farm in a husbandlike manner according to the custom of the country where the premises are situated (*x*), unless, indeed, the lease or agreement contain some express covenant or premise inconsistent with such custom and sufficient to exclude it (*y*). The removal of hay, straw, dung, crops, etc., from a farm is waste, where it is contrary to the custom of the country, and will be restrained by injunction (*z*). So also the sowing of lands with pernicious crops, such as mustard, is waste, and will be restrained (*a*).

The obligation to cultivate lands according to the custom of the country does not apply to a garden or meadow let with a residence (*b*).

Covenant to cultivate not enforced by mandatory injunction.

The Court will not, however, enforce by mandatory injunction the performance of covenants to cultivate land (*c*).

(*s*) *Hutton* v. *Warren*, 1 M. & W. 472; 5 L. J. (N. S.) Ex. 234; 46 R. R. 368, *per* Lord Wensleydale. See the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 26, 46, 48.

(*t*) *Leigh* v. *Hewitt*, 4 East, 154; *Dalby* v. *Hirst*, 1 B. & B. 224; 21 R. R. 577; and see *Tucker* v. *Linger*, 21 C. D. 34; 8 A. C. 508; 51 L. J. Ch. 713; 52 L. J. Ch. 941.

(*x*) *Powley* v. *Walker*, 5 T. R. 373; 2 R. R. 619; *Halifax* v. *Chambers*, 4 M. & W. 662; *Beale* v. *Saunders*, 3 Bing. N. C. 850; 6 L. J. (N. S.) C. P. 283; 43 R. R. 823. See the Agricultural Holdings Act, 1908 ss. 26, 46, and 48.

(*y*) *Hutton* v. *Warren*, 1 M. & W. 466; 5 L. J. (N. S.) Ex. 234; 46 R. R. 368; *Clark* v. *Roystor* 13 M. & W. 752; 14 L. J. Ex. 3; 67 R. R. 806; *Wilkins* v. *Wood*, 17 L. J. Q. B. 319; *Tucker* v. *Linger*, *supra*, and notes to *Wigglesworth* v. *Dallison*, 1 Sm. L. C. 545; and see s. 26 of the Agricultural Holdings Act, 1908.

(*z*) *Pulteney* v. *Shelton*, 5 Ves. 147, 260, n.; —— v. *Onslow*, 16 Ves. 173; *Kimpton* v. *Eve*, 2 V. & B. 349; 13 R. R. 116; *Pratt* v. *Brett*, 2 Madd. 62; 17 R. R. 187; *Walton* v. *Johnson*, 15 Sim. 352; 74 R. R. 99; and see the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 26, 46.

(*a*) *Pratt* v. *Brett*, 2 Madd. 62; 17 R. R. 187.

(*b*) *Johnstone* v. *Symons*, 9 L. T. O. S. 535. See, as to cultivation of glebe land, *Bird* v. *Relph*, 4 B. & Ad. 826; 2 L. J. (N. S.) K. B. 99; 38 R. R. 382.

(*c*) *Musgrave* v. *Horner*, 31 L. T.

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Waste in buildings.

Waste in houses or buildings consists in pulling them down, altering their character, or in suffering them to go to decay (*d*). The law of waste extends not only to dwelling-houses, but to every description of buildings (*e*). An alteration of buildings which changes their nature and character is waste, even although the value of the premises be thereby increased. Thus, the converting two chambers into one, or *è converso*, or the converting a hand-mill into a horse-mill, or a corn-mill into a fulling-mill, or a malt-mill to a corn-mill, or a log-wood mill to a cotton-mill, have been held to be waste (*f*). But every alteration by a lessee of the demised premises is not necessarily waste. It is in every case a question of fact whether the act changes the nature of the property having regard to the user of the demised premises permissible under the lease. Thus, the conversion of part of a private house into a shop (*g*), and the conversion of a chapel into a theatre (*h*), have been held not to be waste. But the building of a new house, where there was one before, may be waste, if it impair the evidence of title (*i*). In *Smyth* v. *Carter* (*k*) the Court granted an interlocutory injunction restraining a man from pulling down a house and building another which the landlord objected to. "It is not sufficient," said Lord Romilly, M.R. (*l*), "that the house proposed to be built is a better one. The landlord has a right to exercise his own judgment

632; *Phipps* v. *Jackson*, 56 L. J. Ch. 559.

(*d*) Co. Litt. 53 a. See *Kimpton* v. *Eve*, 2 V. & B. 353; 13 R. R. 116; *Hyman* v. *Rose*, (1912) A. C. p. 632; 81 L. J. K. B. 1062.

(*e*) *Doe* v. *Earl of Burlington*, 5 B. & Ad. 507; 3 L. J. (N. S.) K. B. 26; 39 R. R. 549.

(*f*) Co. Litt. 53 a; *Green* v. *Cole*, 2 Wms. Saund. 228; *City of London* v. *Graeme*, Cro. Jac. 182; *Brydges* v. *Kilburn*, cit. 5 Ves. 689; 5 R. R. 146; *Hunt* v. *Browne*, Sau. & Sc. 191; but see *Grand Canal Co.* v. *McNamee*, 29 L. R. Ir. 131.

(*g*) *Doe* v. *Jones*, 4 B. & Ad. 126; 2 L. J. (N. S.) K. B. 11; 38 R. R. 234. See *Hyman* v. *Rose*, (1912) A. C. p. 632; 81 L. J. K. B. 1062. Cf. *Bonnett* v. *Sadler*, 14 Ves. 526; 9 R. R. 341; *Maunsell* v. *Hort*, 1 L. R. Ir. 88.

(*h*) *Hyman* v. *Rose*, (1912) A. C. 623; 81 L. J. K. B. 1062.

(*i*) Co. Litt. 53 a; *Cole* v. *Green*, 1 Lev. 309; S. C., nom. *Cole* v. *Forth*, 1 Mod. 94; but see *Jones* v. *Chappell*, 20 Eq. 539; 44 L. J. Ch. 658; *Doherty* v. *Allman*, 3 A. C. p. 735.

(*k*) 18 Beav. 78; 104 R. R. 506.

(*l*) Ib.

and caprice, whether there shall be any change: if he objects, the Court will not allow a tenant to pull down one house and build another in its place" (*m*).

But in *Doherty* v. *Allman* (*n*), where land with buildings which had been used as stores was leased for a very long period, and the buildings had fallen out of repair, and the lessee was proceeding to convert the stores into dwelling-houses, which would much increase their value, the Court refused to interfere by injunction.

A covenant to repair being positive as well as negative in its obligations, the tenant is thereby bound as well not to do an act amounting to voluntary waste as to repair dilapidations (*o*). The existence in a lease of a covenant to repair and to surrender up the buildings at the end of the term in good condition, does not preclude the Court from granting an injunction to restrain the pulling down of buildings just before the end of the term (*p*).

Court will not enforce by mandatory order covenants to repair.

A mandatory order, however, will not be made to direct a person to repair (*q*).

Permissive waste.

The suffering houses, buildings, etc., to go to decay by wrongfully neglecting to repair them is permissive waste. An action on the case for permissive waste lies against a tenant for life or years *upon whom an express duty to repair is imposed by the instrument which creates the estate* (*r*). There are also authorities at law to show that an action on the case for permissive waste can be maintained against a tenant for life or years, even though no express duty is imposed on him by the instrument which creates the estate (*s*). But it

(*m*) *Maunsell* v. *Hort*, 1 L. R. Ir. 88; Bro. Ab. Waste; Cruise, Dig. tit. iii. c. 2, s. 12. But see *Hyman* v. *Rose*, (1912) A. C. 623; 81 L. J. K. B. 1062.

(*n*) 3 A. C. 709; and see *Meux* v. *Cobley*, (1892) 2 Ch. 253; 61 L. J. Ch. 449; *West Ham Charity Board* v. *East London Waterworks Co.*, (1900) 1 Ch. p. 635; 69 L. J. Ch. 259; *Hyman* v. *Rose*, (1912) A. C. 623; 81 L. J. K. B. 1062.

(*o*) *Doe* v. *Jackson*, 2 Stark. 293; *Doe* v. *Bird*, 6 Car. & P. 195; 4 L. J. (N. S.) K. B. 32; 41 R. R. 408.

(*p*) *Mayor of London* v. *Hedger*, 18 Ves. 356.

(*q*) *Att.-Gen.* v. *Staffordshire County Council*, (1905) 1 Ch. 336, 342; 74 L. J. Ch. 155; see *Reynolds* v. *Barnes*, (1909) 2 Ch. p. 372; 78 L. J. Ch. p. 647; *Worcester College, Oxford* v. *Oxford Canal Navigation*, (1912) 81 L. J. Ch. p. 3.

(*r*) *Woodhouse* v. *Walker*, 5 Q. B. D. 404; 49 L. J. Q. B. 609.

(*s*) *Green* v. *Cole*, 2 Wms. Saund.

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seems to be now settled that, as a general rule, in the absence of express agreement, there is no liability on a tenant for life or a tenant for years for mere permissive waste (*t*). Where, however, a lessee who is bound by his lease to keep the premises in repair, bequeaths the lease to persons in succession, the tenant for life under the will is bound, as between himself and the testator's estate, to keep the property in repair, so far as the want of repair arises during the continuance of his interest (*u*). By the custom of certain manors, the copyhold tenants are bound to keep their holdings in repair (*x*), but in the absence of such a custom there is no obligation on the copyhold tenants to repair their tenements (*y*).

Fixtures.

The general rule of the common law is that personal chattels once annexed to the freehold became part of it, and may not be again severed without the consent of the owner of the inheritance, and that it is therefore waste if a tenant for life or years who has annexed a personal chattel to the freehold afterwards takes it away, and the Court will restrain the unlawful removal (*z*). But many exceptions have been engrafted on this general rule, the most important being in favour of trade

General rule of law.

Exceptions.

646; *Yellowly* v. *Gower*, 11 Exch. 294; 24 L. J. Ex. p. 299; *Davies* v. *Davies*, 38 C. D. 499; 57 L. J. Ch. 1093.

(*t*) *Barnes* v. *Dowling*, 44 L. T. 811; *In re Cartwright*, *Avis* v. *Newman*, 41 C. D. 532; 58 L. J. Ch. 590; *Dimond* v. *Newburn*, (1898) 1 Ch. p. 32; 67 L. J. Ch. p. 17; *In re Parry and Hopkin*, (1900) 1 Ch. 160; 69 L. J. Ch. 190; *In re Lacon's Settlement*, (1911) 2 Ch. p. 21; 80 L. J. Ch. 610; and see *Powys* v. *Blagrave*, De G. M. & G. 448, 458; 24 L. J. Ch. 142. A tenant at will or from year to year is not liable for permissive waste (*Torriano* v. *Young*, 6 C. & P. 8; *Blackmore* v. *White*, (1899) 1 Q. B. p. 300; 68 L. J. Q. B. 184).

(*u*) *In re Betty*, (1899) 1 Ch. 821; 68 L. J. Ch. 435; *Re Gyers*, (1899) 2 Ch. 54; 68 L. J. Ch. 442; *Re Parry and Hopkin*, (1900) 1 Ch. p. 161; 69 L. J. Ch. 190; *Re Smith*, *Bull* v. *Smith* (1901), 84 L. T. 835; *Re Waldron*, (1904) 1 Ir. R. 240.

(*x*) See *Blackmore* v. *White*, (1899) 1 Q. B. 295; 68 L. J. Q. B. 180; *Galbraith* v. *Poynton*, (1905) 2 K. B. p. 265; 74 L. J. K. B. 657.

(*y*) *Galbraith* v. *Poynton*, (1905) 2 K. B. 258; 74 L. J. K. B. 649.

(*z*) *Elwes* v. *Maw*, 3 East, 38; 6 R. R. 523; *Sunderland* v. *Newton*, 3 Sim. 450; 30 R. R. 186; *Richardson* v. *Ardley*, 38 L. J. Ch. 508; *Re Hulse*, (1905) 1 Ch. p. 410; 74 L. J. Ch. 246; *Re Lord Chesterfield's Settled Estates*, (1911) 1 Ch. p. 241; 80 L. J. Ch. pp. 187, 188.

and agricultural fixtures (*a*). Chattels which have been affixed to the freehold for the purposes of trade (*b*), and which retain the general character of trade fixtures, may be removed by a tenant for years during his term (*c*). This exception has however been held not to extend to buildings which have been let into the soil, although used for trading purposes. A tenant for years, even under the most favourable circumstances, has no right (*d*) to remove any building which he has erected merely because it is used only for the purposes of trade (*e*).

Tenants' fixtures

The indulgence which exists with respect to trade fixtures extends also to many cases of fixtures put up by a tenant for years at his own expense for the purposes of ornament or domestic convenience, such as marble chimney-pieces, pier glasses, wainscots fixed with screws, hangings nailed to the walls, stoves or grates fixed into the chimney with brickwork, and cupboards supported by holdfasts and the like (*f*).

(*a*) See the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 21 and 42; and the Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 47 (4).

(*b*) See *Mears* v. *Callender*, (1901) 2 Ch. 388; 70 L. J. Ch. 621; and *Re Lord Chesterfield's Settled Estates*, (1911) 1 Ch. pp. 241, 242; 80 L. J. Ch. 187, 188.

(*c*) *Lawton* v. *Lawton*, 3 Atk. 18; *Elwes* v. *Maw*, 3 East, 38; 6 R. R. 523; 2 Smith, L. C. 207—210; *Foley* v. *Addenbroke*, 13 M. & W. 174; 14 L. J. Ex. 169; 67 R. R. 540; *Ward* v. *Countess of Dudley*, 57 L. T. 20; *Mears* v. *Callender*, (1901) 2 Ch. 388; 70 L. J. Ch. 621; *Re Hulse, Beattie* v. *Hulse*, (1905) 1 Ch. pp. 410, 411; 74 L. J. Ch. 248; *Mowatt* v. *Hudson*, (1911) 105 L. T. 400; and see the Agricultural Holdings Act, 1908, s. 21, and the Small Holdings and Allotments Act, 1908, s. 47.

(*d*) But see the Agricultural Holdings Act, 1908, ss. 21 and 42; and the Small Holdings and Allotments Act, 1908, s. 47 (4).

(*e*) *Elwes* v. *Maw*, 3 East, 38; 6 R. R. 523; 2 Smith, L. C. 208; *Whitehead* v. *Bennett*, 27 L. J. Ch. 474; but see *Mears* v. *Callender*, (1901) 2 Ch. 388; 70 L. J. Ch. 621; and the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 21 and 42; and the Small Holdings and Allotments Act, 1908, s. 47 (4). See as to right of miners in certain districts to remove buildings erected for mining purposes, *Wake* v. *Hall*, 8 A. C. 195; 52 L. J. Q. B. 494. See also *Ward* v. *Countess of Dudley*, 57 L. T. 20.

(*f*) *Squier* v. *Mayer*, Freem. Ch. 248; 2 Eq. Ab. 430; *Beck* v. *Rebow*, 1 P. Wms. 94; *Ex parte Quincy*, 1 Atk. 477; *Lawton* v. *Lawton*, 3 Atk. 15; *Lee* v. *Risdon*, 7 Taunt. 191; 17 R. R. 484, *per* Gibbs, C.J.; *Rex* v. *St. Dunstan's*, 4 B. & C. 686, *per* Bayley, J.; *In re De Falbe*, *Ward* v. *Taylor*, (1901) 1 Ch. 523; S. C., under name of *Leigh* v. *Taylor*, (1902) A. C. 157, 159; 71 L. J. Ch. 272; *In re Lord Chesterfield's Settled Estates*, (1911) 1 Ch. p. 242; 80 L. J. Ch. pp. 188, 189.

When removable.

Chattels which have been annexed to the freehold by a tenant for years, if removable at all, should be removed by him before the expiration of the tenancy (*g*), or at all events before the expiration of such further period of possession as he holds the premises under a right still to consider himself as tenant (*h*). A tenant whose interest is of an uncertain duration has a right to remove fixtures after it has expired, provided he does so within a reasonable time (*i*). Where a tenant surrenders his interest to his landlord, the mortgagee or purchaser from the tenant of his trade fixtures prior to the determination of the lease is entitled to remove them within a reasonable time after the surrender (*k*); but where a tenant surrendered his lease in order that a new lease might be granted to him without any provision as to the removal of the fixtures, he was held to have lost the right to the fixtures, for a surrender of demised premises *primâ facie* includes fixtures (*l*).

Devisee or heir-at-law and executor.

Questions respecting the right to fixtures may arise also between tenant for life and remainderman, between heir and executor, between vendor and purchaser, between mortgagor and mortgagee, between devisee and legatee, and in other cases (*m*). In cases between the devisee or heir-at-law and

(*g*) *Lyde* v. *Russell*, 1 B. & Ad. 394; 9 L. J. K. B. 26; 35 R. R. 327; *Pugh* v. *Arton*, L. R. 8 Eq. 626; 38 L. J. Ch. 619; *In re Glasdir Copper Works*, (1904) 1 Ch. 823, 824; 73 L. J. Ch. 461; *In re Hulse*, (1905) 1 Ch. p. 411; 74 L. J. Ch. p. 248; *Leschallas* v. *Woolf*, (1908) 1 Ch. p. 652; 77 L. J. Ch. p. 351. See also the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 21 (i.), 42 (ii.), (iii.), and the Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 47 (4).

(*h*) *Weeton* v. *Woodcock*, 7 M. & W. 14; 10 L. J. Ex. 183; 56 R. R. 606; *Ex parte Brock*, 10 C. D. p. 109; *Barff* v. *Probyn*, 73 L. T. 118; and see *In re Glasdir Copper Works*, and *Leschallas* v. *Woolf*, *supra*.

(*i*) See *Weeton* v. *Woodcock*, *Pugh* v. *Arton*, *Ex parte Brook*, and *In re Glasdir Copper Works*, *supra* (*g*).

(*k*) *In re Glasdir Copper Works*, *supra*.

(*l*) *Leschallas* v. *Woolf*, *supra* (*g*).

(*m*) See *Haley* v. *Hammersley*, 3 De G. F. & J. 587; 30 L. J. Ch. 771 (mortgagor and mortgagee); *Southport Banking Co.* v. *Thompson*, 37 C. D. 64; 57 L. J. Ch. 114 (mortgagor and mortgagee); *In re De Falbe*, *Ward* v. *Taylor*, (1901) 1 Ch. 523; S. C. under name *Leigh* v. *Taylor*, (1902) A. C. 154; 71 L. J. Ch. 273; *In re Hulse*, (1905) 1 Ch. 406; 74 L. J. Ch. 246 (tenant for life and remainderman); *Monti* v.

the executor the general rule of law obtains with the most rigour in favour of the inheritance and against the right to consider as a personal chattel anything which has been annexed to the freehold (*n*). In these cases no question of injustice arises. There is no injustice, no forfeiture of any property, when a man who is owner in fee affixes his own chattels to the freehold (*o*). In cases between the executors of a tenant for life and the remainderman the claim of the former to fixtures is favoured (*p*), but not so much as that of a tenant for years in cases between landlord and tenant (*q*). Successive incumbents of a benefice stand to each other somewhat in the relation of tenant for life and remainderman, but in respect of the right to fixtures the law is much more liberal in favour of a deceased incumbent than in the ordinary case of tenant for life and remainderman (*r*). In cases between vendor and purchaser, or mortgagor and mortgagee, the right to fixtures may depend on the terms of the contract (*s*). Thus, on a sale of land, fixtures upon the premises will pass to the purchaser by the conveyance in the absence of a contrary intention in the contract (*t*), so also, a mortgage of premises will pass the fixtures upon the premises, a mortgage of a

Executor of tenant for life, and remainderman.

Vendor and purchaser.

Mortgagor and mortgagee.

Barnes, (1901) 1 Q. B. 205; 70 L. J. K. B. 225 (mortgagor and mortgagee); *Re Whaley*, (1908) 1 Ch. 615; 77 L. J. Ch. 367 (devisee and legatee); *In re Lord Chesterfield's Settled Estates*, (1911) 1 Ch. 237; 80 L. J. Ch. 187, 189 (executor and devisee or heir).

(*n*) See 2 Smith, L. C. 215; *Norton* v. *Dashwood*, (1896) 2 Ch. 497; 65 L. J. Ch. 737; *In re Hulse*, (1905) 1 Ch. 410, 411; 74 L. J. Ch. 248. *In re Whaley*, (1908) 1 Ch. 615, 620; 77 L. J. Ch. 345; *In re Lord Chesterfield's Settled Estates*, (1911) 1 Ch. 237; 80 L. J. Ch. 187.

(*o*) *Per* Stirling, L.J., in *In re De Falbe, Ward* v. *Taylor*, (1901) 1 Ch. p. 541; 70 L. J. Ch. p. 294; *In re Hulse*, (1905) 1 Ch. 410, 411; 74 L. J. Ch. p. 248; *In re Whaley*, (1908) 1 Ch. 615, 620; 77 L. J. Ch. p. 370.

(*p*) *Norton* v. *Dashwood*; *In re De Falbe, supra*; S. C. under name of *Leigh* v. *Taylor*, (1902) A. C. 157; 71 L. J. Ch. 272; and see *In re Hulse*, and *In re Whaley*, *supra*.

(*q*) 2 Smith, L. C., 214; *Norton* v. *Dashwood*, *In re Hulse*, *supra*.

(*r*) *Martin* v. *Roe*, 7 E. & B. 237; 26 L. J. Q. B. 129; 110 R. R. 577.

(*s*) *Colegrave* v. *Dias Santos*, 2 B. & C. 76, 80; 1 L. J. (O. S.) K. B. 239; see *Haley* v. *Hammersley*, 3 De G. F. & J. 591; 30 L. J. Ch. 771, 773; see *Reynolds* v. *Ashby*, (1903) 1 K. B. 87, 99; (1904) A. C. 466, 470; 73 L. J. K. B. 946.

(*t*) *Colegrave* v. *Dias Santos*, *supra*.

lease m by a lessee will carry the fixtures of the property in lease, and the power to remove which fixtures was in the tenant, and fixtures attached by a mortgagor to the property after the date of the mortgage will also (unless under special stipulations) pass to the mortgagee (*u*). This, however, does not necessarily prevent the mortgagor while in possession from dealing with such fixtures. Thus if machinery is affixed to premises in such a manner as to become a fixture under a purchase and hiring agreement, by which, as between mortgagor and vendor, it remains the property of the vendor, the mortgagee has the right to take possession of the machinery as part of his security, although not paid for by the mortgagor under the purchase and hiring agreement, and although put up after the mortgage, and although the vendor had no knowledge of the existence of the mortgage; but a mortgagee who does not take possession would fail to obtain an injunction to restrain the removal of such fixtures unless he proved that his security was deficient or would become so by such removal (*x*). But where a company fixed on their business premises machinery obtained from the owner under a hire-purchase agreement under which the owner had power to remove the machinery on non-payment of instalments of purchase money, and the company subsequently without disclosing the hire-purchase agreement, created not a legal but merely an equitable mortgage of their business premises, it was held that the equitable interest of the owner of the machinery under the hire-purchase agreement had priority over the equitable interest of the mortgagee (*y*).

(*u*) *Meux* v. *Jacobs*, L. R. 7 H. L. 481; 44 L. J. Ch. 481; *Holland* v. *Hodgson*, L. R. 7 C. P. 328, 337; 41 L. J. C. P. 146; *Clinie* v. *Wood*, L. R. 4 Ex. 328; 38 L. J. Ex. 223; *Southport Banking Co.* v. *Thompson*, 37 C. D. 64; 57 L. J. Ch. 114; *Gough* v. *Wood*, (1894) 1 Q. B. 713, 718; 63 L. J. Q. B. 564; *Hobson* v. *Gorringe*, (1897) 1 Ch. 182; 66 L. J. Ch. 114; *Monti* v. *Barnes*, (1901) 1 Q. B. 205; 70 L. J. K. B. 225; *Reynolds* v. *Ashby*, *supra* (*s*); *Ellis* v. *Glover & Co.*, (1908) 1 K. B. 588, 398, 399; 77 L. J. K. B. 251.

(*x*) *Ellis* v. *Glover*, (1908) 1 K. B. p. 399; 77 L. J. K. B. p. 257, *per* Farwell, L.J.

(*y*) *In re Samuel Allen & Co.*, (1907) 1 Ch. 575; 76 L. J. Ch. 362; and see *In re Morrison, Jones and Taylor*, (1913) 108 L. T. 675; 29 T. L. R. 474.

SECTION 3.—PERSONS FOR AND AGAINST WHOM INJUNCTIONS ARE GRANTED.

Waste by tenant for life.

An estate for life, whether it be given expressly by the instrument which creates it, or whether it arises from equitable considerations, is always impeachable of waste, unless the contrary be provided by express stipulation (*z*). The application for an injunction to restrain a tenant for life or for years from committing waste is usually made by the owner of the inheritance, but the application may be made by a remainderman for life, as well as by the owner of the inheritance; and even without making the persons entitled to the inheritance parties to the action (*a*). The intervention of an intermediate estate for life does not deprive the owner of the inheritance or a remainderman for life of his right to an injunction (*b*). So, also, trustees to preserve contingent remainders may bring a bill to stay waste against a tenant for life (*c*). In *Garth* v. *Cotton*, Lord Hardwicke held that trustees to preserve contingent remainders might have an injunction against a tenant for life and a remote remainderman colluding to commit waste while the remainders were in expectancy (*d*). It would appear that trustees to preserve contingent remainders may not only institute proceedings to stay waste, but are bound to do so for the benefit of the contingent remainders (*e*).

If the legal estate is in trustees upon trust for a tenant for life, with remainders over, and the tenant for life commits waste, the trustees have a right to file a bill to stay the waste, and it is their duty to do so, if parties unborn are interested (*f*). A remainderman, however, need not look to

(*z*) *Cole* v. *Peyson*, 1 Ch. Rep. 57; *Whitfield* v. *Bewit*, 2 P. Wms. 240; *In re Ridge*, 31 C. D. 504, 507; 55 L. J. Ch. 265; *Pardoe* v. *Pardoe*, (1900) 82 L. T. 547.

(*a*) *Mollineux* v. *Powell*, 3 P. W. 268, n.; *Birch-Wolfe* v. *Birch*, 9 Eq. 683; 39 L. J. Ch. 345.

(*b*) *Tracy* v. *Tracy*, 1 Vern. 23; *Farrant* v. *Lovell*, 3 Atk. 723.

(*c*) *Perrot* v. *Perrot*, 3 Atk. 94; *Garth* v. *Cotton*, ib. 751; 1 Dick. 183; 1 Ves. Sen. 524, 546.

(*d*) See *Williams* v. *Duke of Bolton*, 1 Cox, 72; 3 P. Wms. 268, n.; 4 R. R. 21.

(*e*) *Stansfield* v. *Habergham*, 10 Ves. 278, *per* Lord Eldon; 7 R. R. 409.

(*f*) *Denton* v. *Denton*, 7 Beav.

the trustees for protection (*g*); and even where an estate is vested in trustees upon trust to sell and divide the proceeds amongst a class of persons, any member of that class may apply for an injunction to restrain the tenant for life from committing waste (*g*).

Order XVI., r. 37.

Order XVI., r. 37, provides that in all cases of actions for the prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest.

The remainderman of an undivided share of the inheritance may have an injunction and an account (*h*). When an estate for life is given with certain directions which impose an obligation on the tenant for life not to be guilty of waste, either voluntary, or permissive, the Court will interpose to prevent either him or his alienee from doing any act which would be a breach of the condition or obligation (*i*).

Waste between coparceners, joint tenants, and tenants in common.

As between coparceners, joint tenants, or tenants in common, the Court will not interpose to restrain waste (*k*), unless the wrongdoer is insolvent, or incapable of paying to the other the excess of the value beyond his own share (*l*), or is occupying tenant to the other (*m*), or unless the waste amounts to destructive waste, or spoliation (*n*).

Tenant in tail in possession.

A tenant in tail in possession is dispunishable of both legal and equitable waste, because he may at any time bar the entail, and acquire the absolute fee simple (*o*). It has

388; *Pugh* v. *Vaughan*, 12 Beav. 526; 85 R. R. 160; *Viner* v. *Vaughan*, 2 Beav. 469; 50 R. R. 245, and see Order XVI. r. 8.

(*g*) *Viner* v. *Vaughan*, *supra*.

(*h*) Co. Litt. 53 b; *Whitfield* v. *Bewit*, 2 P. W. 241.

(*i*) *Kingham* v. *Lee*, 15 Sim. 409; 16 L. J. Ch. 49; 74 R. R. 103. See *Blagrave* v. *Blagrave*, 1 De G. & S. 253; 16 L. J. Ch. 346; 75 R. R. 99.

(*k*) *Twort* v. *Twort*, 16 Ves. 129; 10 R. R. 141. See *Bailey* v. *Hobson*, 5 Ch. 182; 39 L. J. Ch. 270, where a decree had been made in a partition suit.

(*l*) *Smallman* v. *Onions*, 3 Bro. C. C. 620.

(*m*) *Twort* v. *Twort*, 16 Ves. 128; 10 R. R. 141.

(*n*) *Durham and Sunderland Railway Co.* v. *Wawn*, 3 Beav. 119; 52 R. R. 56; *Arthur* v. *Lambe*, 2 Dr. & Sm. 428; *Bailey* v. *Hobson*, 5 Ch. 180; 39 L. J. Ch. 270; *Job* v. *Potton*, 20 Eq. 84; 44 L. J. Ch. 262 (mine); and see *Glyn* v. *Howell*, (1909) 1 Ch. 666, 677; 78 L. J. Ch. 391 (mine trespass).

(*o*) *Turner* v. *Wright*, 3 Madd.

been held that an infant tenant in tail in possession has the same right as one of full age against the remainderman, and that his guardians might commit waste, although by converting the nature of the property from realty into personalty the next of kin of the infant would, in the event of his death, be benefited at the expense of the remainderman (*p*). In *Saville's case* (*q*), Lord King would not restrain by injunction the guardians of an infant tenant in tail in possession from cutting timber, whilst the infant was in very bad health. After the death of the infant, which took place shortly afterwards, a bill by a remainderman for an account against his assets was dismissed (*r*). An injunction may be had against the guardian of an infant tenant in tail, if the application be made on behalf of the infant (*s*). The right to be dispunishable of waste extends not only to the grantee of a tenant in tail, but also to the grantee of such grantee (*t*). In the case of an infant tenant in tail in possession the Court will authorise the cutting of timber fit to be felled in a due course of management, but where the infant is tenant in tail in remainder subject to a life estate impeachable of waste the Court will only authorise the cutting of timber where the interest of the succession requires it (*x*).

Tenant in tail after possibility of issue extinct.

A tenant in tail after possibility of issue extinct, who has been once in possession, is in respect of the estate of inheritance, which has been once in him, as dispunishable of waste as a tenant for life, who is made so by express limitation (*y*); but he may not, any more than a tenant for life dispunishable for waste, commit equitable waste (*z*).

The privileges of tenant in tail after possibility of issue

532; 2 De G. F. & J. 246; 29 L. J. Ch. 601.

(*p*) *Lyddall* v. *Clavering*, cited Amb. 371; and see C. A. 1881, s. 42.

(*q*) Cited Moseley, 224.

(*r*) See *Tullitt* v. *Tullitt*, Amb. 370; *Lyddall* v. *Clavering*, ib. 371, n.

(*s*) *Roberts* v. *Roberts*, Hard. 96.

(*t*) 8 Bac. Ab. 392.

(*x*) *Roberts* v. *Roberts*, Hard. 96; Cruise, Dig. tit. ii. c. 1, s. 32.

(*y*) *Lewis Bowles' case*, 11 Co. Rep. 79 b; *Williams* v. *Williams*, 15 Ves. 430; 11 R. R. 357, n.; *Turner* v. *Wright*, 2 De G. F. & J. 247; 29 L. J. Ch. 601.

(*z*) *Abraham* v. *Bubb*, Freem. Ch. 52; 2 Sw. 172, n.; *Turner* v. *Wright*, 3 De G. F. & J. 247.

extinct are in respect of the privity of his estate and of the inheritance that was once in him: if, therefore, he conveys his estate to another, such person will be considered as a mere tenant for life (*a*).

Tenant in tail with the reversion of the Crown.

A tenant in tail with the reversion in the Crown, and tenant in tail under an Act of Parliament which precludes the barring of the entail, have all the legal rights and incidents which belong to a tenancy in tail, and are dispunishable of waste whether legal or equitable (*b*). But where the rights and incidents of the tenancy in tail are specially qualified by the provisions of the statute, the Court may feel bound to interfere to prevent equitable waste (*c*).

Tenant in fee, subject to executory devise over.

A tenant in fee simple, subject to an executory devise over is within the principle of equitable waste, but he is dispunishable of legal waste (*d*), unless the testator has imposed on him a condition not to commit waste (*e*).

Heir by resulting trust.

An heir taking by resulting trust until the happening of a contingency is within the principle of equitable waste (*f*).

Where a tenant for life under a will, who was also appointed executrix "with full and absolute control" over all the testator's property, cut and sold timber, it was held that the will did not make the tenant for life dispunishable for waste, but only entitled her to cut timber in a due course of management for the benefit and preservation of the estate (*g*).

Tenant by lease for lives renewable for ever.

The well-known tenure so common in Ireland by lease for lives renewable for ever was considered by Lord Redesdale so much in the nature of a perpetuity that he refused an application for an injunction to restrain the cutting of timber (*h*).

(*a*) Co. Litt. 28 a; *Rice's case*, 3 Leon. 241.

(*b*) *Att.-Gen.* v. *Duke of Marlborough*, 3 Madd. 498, 540; 18 R. R. 273; *Davis* v. *Duke of Marlborough*, 2 Sw. 108; 53 R. R. 32; *Turner* v. *Wright*, 2 De G. F. & J. 246; 29 L. J. Ch. 601.

(*c*) *Att.-Gen.* v. *Duke of Marlborough*, 3 Madd. 548; 18 R. R. 275; *Turner* v. *Wright*, 2 De G. F. & J. 246; 29 L. J. Ch. 601.

(*d*) *Turner* v. *Wright*, John. 746; 2 De G. F. & J. 234; 29 L. J. Ch. 598; *In re Hanbury's Settled Estates*, (1913) 2 Ch. 357.

(*e*) *Blake* v. *Peters*, 1 De G. J. & S. 345; 32 L. J. Ch. 200.

(*f*) *Stansfield* v. *Habergham*, 10 Ves. 273; 7 R. R. 409.

(*g*) *Pardoe* v. *Pardoe*, (1900) 82 L. T. 547.

(*h*) *Calvert* v. *Gason*, 2 Sch. & L. 561.

But Lord St. Leonards, after a review of all the authorities, disapproved of this decision, and held that a lessee for lives renewable or ever is not at liberty to commit destructive waste (*i*). But he may, it would appear, commit meliorating waste (*k*). He may not, however, commit equitable waste, though he has been made expressly unimpeachable of waste (*l*).

Waste by copyholders.

An injunction against waste will be granted at the suit of a copyholder against his lessee (*m*), of a copyholder in remainder against a copyholder for life (*n*), or of a copyholder against the lord of the manor (*o*). So, also, an injunction against waste has been granted at the suit of a lord of a manor against his copyhold tenants (*p*) and their under-tenants notwithstanding his remedy by forfeiture (*q*), and an interlocutory injunction has been granted, although the defendant denied that the lands were copyhold (*r*).

Waste by mortgagee in possession.

A mortgagee in possession with a sufficient security may not commit waste (*s*); and he is bound, so far as the rents and profits in his hands will admit, to do necessary repairs (*t*). If, however, the security is insufficient, he is entitled, so long as he is acting *bonâ fide*, to make the most of the property for the purpose of discharging what is due to him. He may cut

(*i*) *Coppinger* v. *Gubbins*, 3 J. & L. 397, 411; 72 R. R. 81.

(*k*) *Coppinger* v. *Gubbins*, 3 J. & L. 397; 72 R. R. 81.

(*l*) *Pentland* v. *Somerville*, 2 Ir. Ch. 289.

(*m*) *Dalton* v. *Gill*, Cary, 89, 90.

(*n*) *Cornish* v. *New*, Finch, 220; *Caldwell* v. *Baylis*, 2 Mer. 408; 16 R. R. 189.

(*o*) *Bowser* v. *Maclean*, 2 De G. F. & J. 415; 30 L. J. Ch. 273; *Eardley* v. *Lord Granville*, 3 C. D. 826; 45 L. J. Ch. 669; see *Inland Revenue Commissioners* v. *Joicey*, (1913) 2 K. B. p. 586; 82 L. J. K. B. p. 787.

(*p*) *Richards* v. *Noble*, 3 Mer. 673; 17 R. R. 168; *Parrott* v. *Palmer*, 3 M. & K. 632, 639; 41 R. R. 149; *Blackmore* v. *White*, (1899) 1 Q. B. 293, 301; 68 L. J. K. B. 180, 184; but see *Galbraith* v. *Poynton*, (1905) 2 K. B. 258, 266; 74 L. J. K. B. 649.

(*q*) *Cuddon* v. *Morley*, 7 Ha. 202; 32 R. R. 65.

(*r*) *Commissioners of Greenwich* v. *Blackett*, 12 Jur. 151; 84 R. R. 856.

(*s*) *Farrant* v. *Lovell*, 3 Atk. 723; *Millett* v. *Davey*, 31 Beav. 470. See, as to cutting timber, C. A. 1881, s. 19 (i.) (iv.), *infra*.

(*t*) *Godfrey* v. *Watson*, 3 Atk. 518; *Wragg* v. *Denham*, 2 Y. & C. Ex. 117; 6 L. J. (N. S.) Ex. 38; 47 R. R. 366.

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timber, and open mines or quarries, but he does so at his own risk and peril. If he incurs a loss, he cannot charge it against the mortgagor, and if he obtains a profit, the whole of that profit must go in discharge of the mortgage debt (*u*). If the security is sufficient, and he has no authority from the mortgagor (*x*), he will under similar circumstances be charged with his receipts and disallowed his expenses (*y*). If the mortgage be of an open mine, the mortgagee is entitled to work it as a prudent owner would do, and he is not bound to advance money for speculative improvements (*z*).

Conveyancing Act, 1881.

In the case of any mortgage made by deed after the 31st December, 1881, the mortgagee, in the absence of provision to the contrary, may while in possession cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament (*a*).

When a mortgagee in possession pending a redemption suit committed waste, he was ordered on motion to deliver up the premises to the mortgagor (*b*).

A first mortgagee in possession will be restrained from paying over the surplus rents to the mortgagor instead of to the second mortgagee (*c*).

Waste by mortgagor in possession.

The position of a mortgagor in possession of the mortgaged estate bears no analogy to that of a tenant for life. A mortgagor in possession is in equity the owner of the estate, and may exercise all acts of ownership and may commit waste, provided he does not diminish the security or render it insufficient (*d*), but if the security is insufficient he may not commit waste (*e*). In order that an injunction may go against a mort-

(*u*) *Millett* v. *Davey*, 31 Beav. 470.

(*x*) *Norton* v. *Cooper*, 25 L. J. Ch. 121.

(*y*) *Thorneycroft* v. *Crockett*, 16 Sim. 445; 80 R. R. 117; *Hood* v. *Easton*, 2 Giff. 692.

(*z*) *Rowe* v. *Wood*, 2 J. & W. 555; 22 R. R. 208.

(*a*) C. A. 1881, s. 19 (i.) (iv.).

(*b*) *Hanson* v. *Derby*, 2 Vern. 392.

(*c*) *Dalmer* v. *Dashwood*, 2 Cox, 378, 382.

(*d*) *Kekewich* v. *Marker*, 3 Mac. & G. p. 329; 21 L. J. Ch. 182; 87 R. R. 99; and see *Ellis* v. *Glover and Hobson*, (1908) 1 K. B. p. 399; 77 L. J. K. B. p. 257.

(*e*) *Farrant* v. *Lovell*, 3 Atk. 723; *Humphreys* v. *Harrison*, 1 J. & W. 581; 14 L. J. Ex. 254; 21 R. R. 238; *King* v. *Smith*, 2 Hare, 239; 62 R. R. 93; *Harper* v. *Aplin*, 54 L. T. 383.

gagor in possession, it must appear on the affidavits that the security is insufficient, or will be rendered insufficient or scanty by the acts of waste complained of (*f*). The meaning of the term "insufficient" is thus explained by Wigram, V.-C., in *King* v. *Smith* (*g*):—"I think the question which must be tried is, whether the property the mortgagee takes as a security is sufficient in this sense—that the security is worth so much more than the money advanced—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into."

After a decree for foreclosure *nisi*, a mortgagor in possession will be restrained from committing waste (*h*). In a case where the mortgagor in possession was bankrupt, but no assignees had as yet been chosen, he was restrained from committing waste (*i*), but in a case where he was merely in prison for debt the application for an injunction was refused (*k*).

After demand of possession made by the mortgagee, a trustee in bankruptcy of the mortgagor will be restrained from cutting crops and removing crops cut (*l*).

Owner of rent-charge not entitled to injunction against owner of land.

The owner of a rent-charge is not in the position of a mortgagee, and cannot obtain an injunction to restrain waste by the owner of the land out of which the rent-charge issues (*m*).

The Court will not grant an injunction to restrain waste at the instance of a judgment creditor in an action by him against the heir and personal representative of the debtor (*n*).

Waste by purchaser before payment.

If a purchaser obtains possession before payment of the purchase money, he will be restrained from committing waste whereby the vendor's security would be diminished (*o*). So,

(*f*) *Hippesley* v. *Spencer*, 5 Madd. 422; *King* v. *Smith*, 2 Ha. 244; 62 R. R. 93; and see *Ellis* v. *Glover and Hobson*, *supra*.

(*g*) 2 Ha. 244; see *Harper* v. *Aplin*, 54 L. T. 383.

(*h*) *Goodman* v. *Kine*, 8 Beav. 379.

(*i*) *Hampton* v. *Hodges*, 8 Ves. 105.

(*k*) *Humphreys* v. *Harrison*, 1 J. & W. 582; 14 L. J. Ex. 254; 21 R. R. 238.

(*l*) *Baynall* v. *Villar*, 12 C. D. 812; 48 L. J. Ch. 695.

(*m*) *Sandeman* v. *Rushton*, 61 L. J. Ch. 136.

(*n*) *Leake* v. *Beckett*, 1 Y. & J. 339; 30 R. R. 794.

(*o*) *Crockford* v. *Alexander*, 15 Ves. 138; 10 R. R. 44; *Casamajor*

also, where moneys due under a settlement are unpaid, the Court has jurisdiction to prevent any waste which may tend to injure the security (*p*).

Landlord and tenant.

The obligations imposed by the common law upon a tenant for life or years, or existing by the custom of the country, apply as between landlord and tenant, except in so far as they may be excluded by the terms of the agreement which subsists between the parties (*q*). Acts contrary to the obligation of a tenant to deal with the premises according to the custom of the country or express agreement are not, properly speaking, acts of waste, unless they are also breaches of the common law, but being of a like mischief with acts of waste, they are restrained upon somewhat similar principles (*r*). There is, however, a distinction in the general principles upon which the Court proceeds in restraining acts of waste done in violation of an express agreement from those on which it proceeds in restraining acts of pure waste at common law. In restraining pure waste, irrespectively of agreement, the Court proceeds upon the ground of irreparable damage, and will not interfere if the damage be small (*s*). In restraining acts of waste in breach of covenants the Court proceeds upon the principle that where parties contract that a particular act shall not be done, either party has a right to insist upon its literal performance by the other irrespectively of the question of damage (*t*).

v. *Strode*, 1 Sim. & St. 381; 39 R. R. 339; *Petley* v. *Eastern Counties Railway Co.*, 8 Sim. 483; 8 L. J. Ch. 209; *Humphreys* v. *Harrison*, 1 J. & W. 580; 21 R. R. 238.

(*p*) *Turkington* v. *Kearman*, Ll. & G. p. 45.

(*q*) *Webb* v. *Plummer*, 2 B. & Ald. 746; 21 R. R. 479; *Phillipps* v. *Smith*, 14 M. & W. 589; 15 L. J. Ex. 201; 69 R. R. 761; *Re Constable and Cranswick*, 80 L. T. 164. See the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 26, 46, 48.

(*r*) *Songhurst* v. *Dixey*, Toth. 255; *Kimpton* v. *Eve*, 2 V. & B. 349, 352; 13 R. R. 116. See the Agricultural Holdings Act, *supra*.

(*s*) *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. 321; 22 L. J. Ch. 811; *Doherty* v. *Allman*, 3 A. C. p. 722.

(*t*) *Doherty* v. *Allman*, 3 A. C. 729; and see *McEacharn* v. *Colton*, (1902) A. C. 107; 71 L. J. P. C. 31; *Osborne* v. *Bradley*, (1903) 2 Ch. p. 451; 73 L. J. Ch. 51; *Formby* v. *Barker*, (1903) 2 Ch. p. 543; 72 L. J. Ch. 721; *Elliston* v. *Reacher*, (1908) 2 Ch. pp. 395, 665; 77

A termor who holds land at a ground rent is as much entitled to an injunction to stay waste by his underlessee as if he had an estate of inheritance (*u*). So, also, may a receiver have an injunction to restrain the tenants or under-tenants from committing waste (*x*).

As between landlord and tenant, no length of abuse will give the tenant a right to commit waste. The allowance of the abuse is only by the permission of the landlord, and can never be turned against him by the tenant. The rights of the tenant are to be ascertained by the lease (*y*).

Waste by ecclesiastical persons.

At common law a dean and chapter, being a corporation aggregate, could alienate their estates as fully and effectually as a person seised in fee. But bishops, deans, parsons, and other corporations sole could not alienate their estates so as to bind their successors without the consent of other parties. Grants made by bishops required confirmation by the dean and chapter, those made by deans required confirmation by the bishop and chapter, those made by archdeacons and prebendaries, by the bishop, dean, and chapter, and those made by parsons and vicars required confirmation by the patron and ordinary (*z*). By the restraining statutes (*a*), however, all ecclesiastical persons were disabled from alienating the possessions of the church for a longer period than twenty-one years or three lives from the making thereof (*b*). It was not enacted expressly by these statutes that the lessees should be

L. J. Ch. 628; 78 L. J. Ch. 87. See, further, as to injunctions against breaches of covenant, *post*, Chap. X.

(*u*) *Farrant* v. *Lovell*, 3 Atk. 72.

(*x*) *Mason* v. *Mason*, Fl. & K. 429; *Nangle* v. *Lord Fingal* [illegible] 142. As a rule a receiver is cause should apply in the first instance to the plaintiff at whose instance he was appointed to make the necessary application to the Court for relief, and on his default may then institute the proceedings: *Parker* v. *Dunn*, 8 Beav. 497; 68 R. R. 171.

(*y*) *Lord Courtown* v. *Ward*, 1 Sch. & L. 8; and see *Elias* v. *Griffith*, 8 C. D. 521; 48 L. J. Ch. 203.

(*z*) Phil. Eccl. Law, 1282.

(*a*) 1 Eliz. c. 19, s. 5; 13 Eliz. c. 10, s. 3.

(*b*) See 14 Eliz. c. 11, 18 Eliz. c. 11. See, however, now 5 & 6 Vict. c. 27, ib. c. 54, ib. c. 108; 14 & 15 Vict. c. 104; 21 & 22 Vict. c. 57; 23 & 24 Vict. c. 124; 24 & 25 Vict. c. 105; 25 & 26 Vict. c. 52; 31 & 32 Vict. c. 114; 51 & 52 Vict. c. 20; see also 8 Edw. 7, c. 28, s. 40,

made impeachable of waste (*c*), but it has been long decided that ecclesiastical persons are restrained by the equity of the statute 13 Eliz. c. 10, from making leases dispunishable of waste (*d*).

Waste by ecclesiastical persons.

A parson being at common law able to alienate his glebe land with the consent of the proper parties, might also, with the consent of the same parties, commit waste; but without such consent a parson has not at common law any more extensive privileges as to waste in general than an ordinary tenant for life (*e*). It seems, however, that in some respects a parson is more favourably situated than an ordinary tenant for life or years, and that some acts which are waste in ordinary cases are not necessarily waste in his case (*f*).

Timber growing on the estates of ecclesiastical persons is a fund for the benefit of the Church, and may not be felled except for the repairs of the ecclesiastical buildings, the parsonage house, the farms, and the barns and outhouses belonging to the parsonage (*g*). Timber growing in the churchyard may not be felled except for the necessary repairs of the chancel or the body of the church (*h*).

There has been some controversy whether an ecclesiastical person is bound specifically to apply the timber he has cut for the purposes of repairs towards the actual repairs for which it was wanted. From a passage in Ambler (*i*) it might appear that Lord Hardwicke was of opinion that a rector or vicar

ib. c. 36, s. 40; 9 Edw. 7, c. 44, Sched. I. (12), ib. c. 47, Sched. (6); and *Richard* v. *Graham*, (1910) 1 Ch. 722; 79 L. J. Ch. 378.

(*c*) Co. Litt. 44 b.

(*d*) *Dean and Chapter of Worcester's case*, 6 Co. Rep. 37 a; *Herring* v. *Dean of St. Paul's*, 3 Sw. 492; 19 R. R. 259; *Wither* v. *Dean and Chapter of Winchester*, 3 Mer. 421; 17 R. R. 107.

(*e*) *Knight* v. *Moseley*, Amb. 176; *Strachey* v. *Francis*, 2 Atk. 216; *Duke of Marlborough* v. *St. John*, 5 De G. & S. 175; 21 L. J. Ch. 381; 90 R. R. 48; *Ecclesiastical Commissioners* v. *Wodehouse*, (1895) 1 Ch. p. 562; 64 L. J. Ch. 329.

(*f*) *Duke of St. Alban's* v. *Skipwith*, 8 Beav. 359; 14 L. J. Ch. 247; 68 R. R. 111; *Bird* v. *Relph*, 4 B. & Ad. 826; 2 Ad. & E. 773; 2 L. J. (N. S.) K. B. 99; 38 R. R. 382.

(*g*) *Strachey* v. *Francis*, 2 Atk. 216; *Sowerby* v. *Fryer*, 8 Eq. 417, 420; 38 L. J. Ch. 617.

(*h*) 35 Edw. 1, stat. 2.

(*i*) 176.

might cut and sell timber to any extent in order to provide a fund for general repairs; but the report of the case is too imperfect and too doubtful to give the weight of Lord Hardwicke's authority to such a proposition (*k*). The rule on the subject would appear to be that an ecclesiastical person may cut and sell timber for the purpose of providing other timber more suitable for the intended repairs, so long as no more is cut than is necessary for the purpose; but that he may not cut timber to defray the general expenses of his repairs (*l*).

Waste by ecclesiastical persons.

An ecclesiastical person may continue the working of mines or gravel pits already open, and which have been lawfully opened, but he may not open new ones (*m*). Ecclesiastical persons, whether aggregate or sole, may grant leases for a long term of years for mining or other purposes with the sanction of the Ecclesiastical Commissioners (*n*). But without such sanction a parson cannot make a valid lease of mines upon his glebe, even though he has the consent of the patron and ordinary (*o*).

In the case of a parson the application for an injunction to stay waste should be made by the patron (*p*), or by the owner of the next presentation (*q*); or, if the patron is a consenting party to the waste, by the ordinary (*r*). Moreover, the

(*k*) *Wither* v. *Dean and Chapter of Winchester*, 3 Mer. 421, 428; 17 R. R. 107, *per* Lord Eldon; *Duke of Marlborough* v. *St. John*, 5 De G. & S. 180; 21 L. J. Ch. 381; 90 R. R. 48, *per* Parker, V.-C.

(*l*) *Wither* v. *Dean and Chapter of Winchester*, 3 Mer. 421; 17 R. R. 107; *Duke of Marlborough* v. *St. John*, 5 De G. & S. 181; 21 L. J. Ch. 381; 90 R. R. 48; *Sowerby* v. *Fryer*, 8 Eq. 417, 422; 38 L. J. Ch. 617.

(*m*) *Knight* v. *Moseley*, Amb. 176; *Huntley* v. *Russell*, 13 Q. B. 591; 18 L. J. Q. B. 239; 78 R. R. 451; *Ross* v. *Adcock*, L. R. 3 C. P. 655, 670; and see *Ecclesiastical Commissioners* v. *Wodehouse*, (1895) 1 Ch. 552; 64 L. J. Ch. 329.

(*n*) 5 & 6 Vict. c. 108, 14 & 15 Vict. c. 104, 21 & 22 Vict. c. 57, 23 & 24 Vict. c. 124.

(*o*) *Ecclesiastical Commissioners* v. *Wodehouse*, (1895) 1 Ch. 552; 64 L. J. Ch. 329; and see *Holden* v. *Weekes*, 1 J. & H. 283; 30 L. J. Ch. 35; and *Bartlett* v. *Philipps*, 4 De G. & J. 414.

(*p*) *Knight* v. *Moseley*, Amb. 176; *Strachey* v. *Francis*, 2 Atk. 216; *Leigh* v. *Leigh*, (1902) 1 Ch. p. 403; 71 L. J. Ch. p. 196.

(*q*) *Sowerby* v. *Fryer*, 8 Eq. 417; 38 L. J. Ch. 617.

(*r*) *Holden* v. *Weekes*, 1 J. & H. 285; 30 L. J. Ch. 35.

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Ecclesiastical Commissioners can maintain an action to restrain the working of mines in glebe lands otherwise than under a lease sanctioned by them (*s*). The right to an injunction to restrain a bishop from wasting the property of the see resides in the Attorney-General, suing on behalf of the Crown, the patron of bishoprics (*t*), and possibly to some extent in the metropolitan (*u*). So a dean and chapter may be restrained at the suit of the Crown, but not at the suit of a lessee holding under them, except in so far as he may have derived any right or interest under the agreement (*x*).

Disturbing churchyard.

The Court of Chancery had no jurisdiction to interfere at the suit of a parishioner to restrain the incumbent from making alterations in the church, churchyard, or other land in his possession in right of his church, matters within the province of the Ecclesiastical Court (*y*). But it seems that the High Court may, as ancillary to the Ecclesiastical Court, grant an injunction to prevent an act in the nature of waste being committed (*z*). The mortgagees of a chapel and burial-ground were restrained from destroying family graves, and removing or defacing tombstones, or obliterating or defacing inscriptions thereon, in the burial-ground attached to the chapel (*a*). So also an injunction was granted at the suit of a bishop to restrain a corporation from disturbing a churchyard (*b*). The lay rector of a parish, in respect of his freehold property in the parish church and churchyard can main-

(*s*) *Ecclesiastical Commissioners* v. *Wodehouse*, (1895) 1 Ch. 552; 64 L. J. Ch. 329.

(*t*) *Knight* v. *Moseley*, Amb. 176; *Wither* v. *Dean and Chapter of Winchester*, 3 Mer. p. 427; 17 R. R. 107.

(*u*) *Wither* v. *Dean and Chapter of Winchester*, ib.

(*x*) *Wither* v. *Dean and Chapter of Winchester*, 3 Mer. 421; 17 R. R. 107; *Herring* v. *Dean and Chapter of St. Paul's*, 3 Sw. 492; 19 R. R. 259.

(*y*) *Earl Fitzwilliam* v. *Moore*, 3 Ir. Eq. 625; *Cardinall* v. *Molyneux*, 4 De G. F. & J. 117, 123. See *Woodman* v. *Robinson*, 2 Sim. N. S. 204; *Batten* v. *Gedye*, 41 C. D. 507; 58 L. J. Ch. 549.

(*z*) *Marriott* v. *Turpley*, 9 Sim. 279; 7 L. J. (N. S.) Ch. 245; 47 R. R. 241; *Cardinall* v. *Molyneux*, 4 De G. F. & J. 117; Phil. Eccl. Law, 1422. But see *Batten* v. *Gedye*, 41 C. D. 507; 58 L. J. Ch. 549.

(*a*) *Moreland* v. *Richardson*, 24 Beav. 33; 26 L. J. Ch. 690; 116 R. R. 18.

(*b*) *Bishop of Durham* v. *Corporation of Newcastle-upon-Tyne*, 1 Set. 539.

tain an action in the High Court against a trespasser (*c*). The Court will not exercise its jurisdiction to compel by mandatory injunction the restoration of a churchway at the suit of a parishioner when the Ecclesiastical Court has jurisdiction to order the restoration (*d*).

Restoration of churchway.

SECTION 4.—EQUITABLE WASTE.

The estate of a tenant for life or years is often declared by the instrument which creates it to be "without impeachment of waste." The effect of the clause at law before the Judicature Act, 1873, s. 25, sub-s. 3, was not only to allow a tenant for life or years to commit waste, but it was a special power permitting him to appropriate the produce of the waste to his own use (*e*). A Court of equity, however, considers the excessive use of the legal power incident to an estate unimpeachable of waste to be inequitable and unjust, and therefore controls it (*f*).

Tenant for life without impeachment of waste.

Equitable waste.

It appears that if an owner in fee settles his estate on himself for life with remainders over, he will not be allowed any larger privileges than he would have had if the settlor had been a stranger (*g*).

Waste which will be restrained as being an unconscientious exercise of a legal power, is called *equitable waste*. An act may amount to equitable waste although there is a total absence of malice. "The presence or absence," said Lord Campbell, in *Turner* v. *Wright* (*h*), "of a bad motive will not enable us to draw any satisfactory line between what is to be considered malicious and what is to be considered equitable

(*c*) *Batten* v. *Gedye*, 41 C. D. 507, 516; 58 L. J. Ch. 549.

(*d*) Ib.

(*e*) *Lewis Bowles' case*, 11 Co. Rep. 81 b; *Kekewich* v. *Marker*, 3 Mac. & G. 327; 21 L. J. Ch. 182; 87 R. R. 99.

(*f*) *Marker* v. *Marker*, 9 Ha. 1, 17; 20 L. J. Ch. 246; 89 R. R. 305; *Micklethwait* v. *M.*, 1 De G. & J. 504, 524; 26 L. J. Ch. 724. See *Baker* v. *Sebright*, 13 C. D. 179, 186; 49 L. J. Ch. 65.

(*g*) *Vincent* v. *Spicer*, 22 Beav. 380; 25 L. J. Ch. 589; 111 R. R. 402. See *Vane* v. *Lord Barnard*, 2 Vern. 738, Prec. Ch. 454; *Barry* v. *Barry*, 1 J. & W. 652.

(*h*) 2 De G. F. & J. 234, 245.

waste, and no line to regulate the interposition of a Court of equity by injunction can well be drawn other than the recognised and well-established line between legal and equitable waste (*i*).

Judicature Act, 1873, s. 25, sub-s. 3.

It is declared by the Judicature Act, 1873, s. 25, sub-s. 3, that an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

Where an estate was devised to a person who was also appointed sole executrix of the testator's will "with full and absolute power" over all the testator's property during her life, the Court held that the words "full and absolute power over the estate," did not render the tenant for life dispunishable for waste, but merely conferred on her large powers of management (*k*).

Pulling down mansion-house or other buildings.

The case which is frequently referred to as being the leading decision on the subject of equitable waste is well known by the name of *Lord Barnard's case* (*l*). It is however far from being the earliest decision on the subject, as it appears to have been a well-known branch of equitable jurisdiction in the time of Lord Nottingham. In *Abraham* v. *Bubb* (*m*), we find that great judge treating it as a settled point that if a tenant for life does waste maliciously, a Court of equity will restrain him, though he had an express power to commit waste. He cited the *Bishop of Winchester's case* and *Lady Evelyn's case* as instances in his recollection in which the Court had so interposed. In several other cases about the same period the Court declared that it would restrain both tenant for life without impeachment of waste, and tenant in tail after possibility of issue extinct, from committing "wilful," "destructive," "malicious," "extravagant," or

(*i*) See *Aston* v. *Aston*, 1 Ves. Sen. 265.

(*k*) *Pardoe* v. *Pardoe*, (1906) 82 L. T. 547.

(*l*) Prec. Ch. 454; 1 Salk. 161.

(*m*) 2 Eq. Ca. Ab. 757; Freem. Ch. 63; 2 Show 69.

"humorsome" waste (*n*). These determinations led to the remarkable case of *Vane* v. *Lord Barnard* (*o*). Lord Barnard, who was tenant for life without impeachment of waste of Raby Castle under the marriage settlement of his son, with remainder to his son, in consequence of some displeasure which he had conceived against him, got workmen together and stripped the castle of the lead, iron, glass, etc., and was proceeding to pull it down, whereupon Lord Cowper granted an injunction and directed an inquiry as to the amount of damage actually done, and ordered it to be repaired at the expense of Lord Barnard. The ground upon which the doctrine was as yet founded, was said to be the destruction of the inheritance, and upon this principle Lord Hardwicke said that if a tenant for life without impeachment of waste were to pull down farm-houses he would restrain him as much as if it were the case of a mansion-house (*p*).

Lord Hardwicke observed that if the decision in *Lord Barnard's case* could be made use of to permit a son to call his father into a Court of equity for every alteration he might make in pulling up the floor of the house, etc., it would be better for the public that Raby Castle had been pulled down than that such a precedent should have been set (*q*). If the acts complained of therefore are of a trivial nature, the Court will not interpose. To obtain an injunction the plaintiff must prove that the defendant's acts are prejudicial to the inheritance (*r*).

Ornamental timber.

The cutting of timber planted or left standing for ornament comes within the principle of equitable waste. The presumed will and intention of the settlor or devisor being the ground for the interference of the Court, the Court does not proceed upon any fancied notions of its own as to whether or not timber may be ornamental (*s*), but confines its protection to

(*n*) *Williams* v. *Day*, 2 Ch. Ca. 32; *Cooke* v. *Whaley*, 1 Eq. Ca. Ab. 400; *Anon.*, Freem. Ch. 278.

(*o*) Prec. Ch. 454; 1 Salk. 161; 2 Vern. 738.

(*p*) 1 Ves. Sen. 265. See *Rolt* v. *Somerville*, 2 Eq. Ca. Ab., tit. Waste, pl. 8.

(*q*) *Piers* v. *Piers*, 1 Ves. Sen. 521.

(*r*) *Meux* v. *Cobley*, (1892) 2 Ch. 253; 61 L. J. Ch. 449.

(*s*) *Marker* v. *Marker*, 9 Ha. 1, 17; 20 L. J. Ch. 246; 89 R. R. 305; *Micklethwait* v. *Micklethwait*,

trees which have been planted or left standing for ornament or shelter by him (*t*). However ornamental in fact trees may be, they will not be protected unless they have been dedicated in some way or other by the settlor or devisor to the purposes of ornament or shelter (*u*). Trees, on the other hand, which have been treated as ornamental by him will be considered by the Court to be ornamental, whether they are or are not, in point of fact, ornamental. The taste of the grantor is binding upon the tenant for life, and the Court will not inquire as to what is beautiful or not. All it has to ascertain is the intention of the settlor or devisor (*x*). Where land is taken in exchange for settled property, timber left standing for ornament or shelter on the land taken in exchange cannot be cut down by the tenant for life (*y*).

Trees which have been planted or left standing for the purpose of excluding objects from view (*z*), or for the purpose of shelter and protection to a mansion-house (*a*), are regarded as ornamental timber. In *Coffin* v. *Coffin* (*b*), Lord Eldon refused that part of the order for an injunction which had been granted by the Vice-Chancellor, restraining a man from cutting trees which protected the premises from the effects of the sea. The reasons of his lordship are not given, and it is difficult to see why that part of the order was refused. It has been said that the protection of the Court is confined to trees planted solely for ornament or shelter, and that trees which have been planted for profit as well as for ornament

1 De G. & J. 524; 26 L. J. Ch. 721. See *Weld-Blundell* v. *Wolseley*, (1903) 2 Ch. 664, 669; 73 L. J. Ch. 45.

(*t*) *Marker* v. *Marker*, 9 Ha. 1, 17; 20 L. J. Ch. 246; *Ford* v. *Tynte*, 2 De G. J. & S. 127; *Weld-Blundell* v. *Wolseley*, *supra*.

(*u*) Ib.; *Williams* v. *Macnamara*, 8 Ves. 70; *Halliwell* v. *Philipps*, 4 Jur. N. S. 607; 111 R. R. 879.

(*x*) *Wombwell* v. *Bellasyse*, 6 Ves. 110, n.; *Marquis of Downshire* v. *Sandys*, ib. 110; *Ford* v. *Tynte*, 2 De G. J. & S. 127; *Weld-Blundell* v. *Wolseley*, (1903) 2 Ch. 670; 73 L. J. Ch. 45.

(*y*) *Ashby* v. *Hincks*, 58 L. T. 557.

(*z*) *Day* v. *Merry*, 16 Ves. 375; 10 R. R. 200; *Campbell* v. *Allgood*, 17 Beav. 627.

(*a*) *Chamberlayne* v. *Dummer*, 1 Bro. C. C. 166; 3 ib. 549; *Tamworth* v. *Lord Ferrers*, 6 Ves. 419; *Marquis of Downshire* v. *Sandys*, ib. 107; *Coffin* v. *Coffin*, Jac. 71; 23 R. R. 1; *Campbell* v. *Allgood*, 17 Beav. 626.

(*b*) Jac. 71.

or shelter will not be protected (*c*); but this statement seems too wide (*d*).

The Court has often much difficulty in determining whether trees have been planted or left standing for ornament. The question in all cases of the sort is a question of fact, and the main difficulty lies in the evidence necessary to establish the fact (*e*). The existence of a mansion-house will in many cases supply the Court with evidence on which to determine the point as to the ornamental character of timber, for trees when in the neighbourhood of a mansion-house will be assumed to have been planted for ornament (*f*).

It is not, however, necessary that timber should be contiguous to a house or park in order to entitle it to the protection of the Court as being ornamental (*g*).

Ornamental timber.

The Court has greater difficulty in determining that trees have been left standing or preserved for ornament, than in determining that trees have been planted for ornament; but the leaving trees standing beyond the usual and provident period of cutting, the clearing out of trees and surrounding them by pleasure walks and seats, and other circumstances, from which an inference arises that the settlor or devisor regarded the trees with other views than as mere subjects of profit, may be considered as *primâ facie* evidence that trees were left standing for shelter or ornament (*h*). It is doubtful whether the Court can ever go back beyond the time of an absolute owner of the estate for the purpose of ascertaining whether timber is to be treated as ornamental (*i*).

(*c*) *Hailiwell* v. *Philipps*, 4 Jur. N. S. 608; 111 R. R. 879; and see *Micklethwait* v. *Micklethwait*, 1 De G. & J. 527; 26 L. J. Ch. 729.

(*d*) See *Bedoyère* v. *Nugent*, 25 L. R. Ir. 143; *Ford* v. *Tynte*, 2 De G. J. & S. 127, 133.

(*e*) *Marker* v. *Marker*, 9 Ha. 17; 20 L. J. Ch. 246.

(*f*) *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504, 526; 26 L. J. Ch. 729. As to evidence, see *Weld-Blundell* v. *Wolseley*, (1903) 2 Ch. 664, 667; 73 L. J. Ch. 45, 47.

(*g*) See *Marquis of Downshire* v. *Sandys*, 6 Ves. 110; and *Wombwell* v. *Bellasyse*, 6 Ves. 110, n.; *Weld-Blundell* v. *Wolseley*, *supra*.

(*h*) *Lushington* v. *Boldero*, 6 Madd. 149; 22 R. R. 261. See *Halliwell* v. *Philipps*, 4 Jur. N. S. 607; 111 R. R. 879; and see *Weld-Blundell* v. *Wolseley*, (1903) 2 Ch. 668, 669; 73 L. J. Ch. 47.

(*i*) *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504, 513; 26 L. J. Ch. 721.

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Although the Court will, as a general rule, abstain from exercising a judgment upon matters of taste, yet where a deed of settlement provided that enough of the most ornamental timber should always remain to leave the beauty of the place unimpaired, and the deed evidently referred to the state of the property at the time of its execution as the standard of beauty, the Court directed an inquiry whether certain trees could be cut without impairing the beauty of the place as it stood at the date of the settlement (*k*). "Although there will be, no doubt," said Turner, L.J. (*l*), "great difficulty in executing a trust or enforcing an injunction to preserve the property according to a certain standard of beauty, the difficulty is not such as it is beyond the power of the Court to grapple with."

The question what a prudent owner would do in the proper and ordinary course of management of his property, is not the measure of the obligation which attaches in a Court of equity upon a tenant for life without impeachment of waste with reference to timber planted or left standing for ornament. But if there be evidence to show that a wood planted or left standing for ornament had been resorted to by the absolute owner for the supply of timber for repairs or sale, a tenant for life without impeachment of waste may do the same, provided he acts as a prudent owner in a due course of management would do (*m*).

Thinning of trees.

In —— v. *Copley* (*n*), where the defendant by his answer stated that he had cut down trees for the improvement of the estate, Lord Erskine granted an injunction against cutting down ornamental timber and trees planted in the situations of others cut down, but without prejudice to the thinning of trees for the sake of ornament (*o*). So also if a tempest has produced gaps in a piece of ornamental planting by which unequal and discordant marks and divisions were occasioned,

(*k*) *Marker* v. *Marker*, 9 Ha. 1; 20 L. J. Ch. 246; 89 R. R. 305.

(*l*) Ib. 9 Ha. 18; 20 L. J. Ch. 252.

(*m*) *Ford* v. *Tynte*, 2 De G. J. & S. 127; and see *Baker* v. *Sebright*, 13 C. D. 185; 49 L. J. Ch. 65.

(*n*) 3 Madd. 525, n. See *Barry* v. *Barry*, 1 J. & W. 654.

(*o*) See now sect. 28, sub-sect. (2), of the Settled Land Act, 1882, which forbids cutting down, except in proper thinning, trees which have been planted as an improvement under the Act.

the Court will not restrain the cutting of a few trees, so as to produce a uniform and consistent appearance (*p*).

Young trees and saplings.

The cutting of saplings or young trees, not fit for the purposes of timber, comes within the principle of equitable waste. The mere fact, however, that trees are being felled of younger growth than would be felled by a prudent owner in the course of a husbandlike management of the estate, is not enough to induce the Court to interfere with the legal power of a tenant for life without impeachment of waste. To come within the principle of equitable waste, a case of spoliation or destruction must be made out (*q*). In *Hole* v. *Thomas* (*r*), Lord Eldon considered the cutting of saplings and timber trees at unseasonable times to be a malicious destruction, and granted an injunction (*s*).

Underwood, etc., etc.

The cutting of underwood of an insufficient growth or at unseasonable times comes also within the principle of equitable waste, when it amounts to a destruction or spoliation of the property (*t*) and generally, it would appear that the principle of equitable waste extends to any act which amounts to malicious waste, and goes to the wanton destruction and spoliation of the property (*u*).

Tenancy for life without impeachment may be qualified

If the tenant for life be expressly bound to keep certain buildings in repair, this qualifies the gift to him without impeachment of waste. The estate for life "without impeachment of waste" is sometimes qualified by the clause "except voluntary waste," or words to that effect. This was the case in *Garth* v. *Cotton* (*x*). In his judgment Lord Hardwicke said

(*p*) See *Lord Mahon* v. *Lord Stanhope*, 3 Madd. 523, n.

(*q*) *O'Brien* v. *O'Brien*, Amb. 107; *Packington's case*, 3 Atk. 216; *Aston* v. *Aston*, 1 Ves. Sen. 265; *Lady Strathmore* v. *Bowes*, 2 Bro. C. C. 188; 1 R. R. 76; *Smythe* v. *Smythe*, 2 Sw. 252; 19 R. R. 72; *Lord Tamworth* v. *Ferrers*, 6 Ves. 419; *Halliwell* v. *Philipps*, 4 Jur. N. S. 608; 111 R. R. 879.

(*r*) 7 Ves. 589; 6 R. R. 195.

(*s*) See *Chamberlayne* v. *Dummer*, 1 Bro. C. C. 166; 3 ib. 549; *Pentland* v. *Somerville*, 2 Ir. Ch. 289.

(*t*) *Hole* v. *Thomas*, 7 Ves. 589; 6 R. R. 195; *Brydges* v. *Stephens*, 6 Madd. 279; 23 R. R. 217; 2 Sw. 150, n.; *Dunn* v. *Bryan*, I. R. 7 Eq. 143.

(*u*) See *Aston* v. *Aston*, 1 Ves. Sen. 264; *Bishop of London* v. *Web*, 1 P. Wms. 527.

(*x*) 3 Atk. 751; 1 Ves. 546; 1 Dick. 188.

incidentally that timber could not be cut, but no relief was sought in that case against the tenant for life. In *Vincent* v. *Spicer* (*y*), Lord Romilly, M.R., considered the words "voluntary or permissive waste" qualifying an estate for life without impeachment of waste, as merely tantamount to "spoil and destroy," and held that the tenant for life or his assignee were entitled to cut such timber and other trees not planted or standing for ornament, as an owner of an estate in fee, having due regard to his present interest, and to the permanent advantage of the estate, might properly cut in a due course of management.

Trustees of a term "without impeachment of waste."

The terms "without impeachment of waste" as applied to trustees of a term for special purposes, have a different sense from that of the same words annexed to a tenancy for life. Trustees of a term without impeachment of waste are bound to a more provident execution of their powers than a tenant for life, and must act in their trust as the Court itself would act(*z*).

Term with impeachment of waste.

It probably makes no difference whether the estate which is made unimpeachable of waste is freehold or a long term of years, determinable on the death of the lessee for life (*a*). But it seems that if a long term of years be declared at its creation to be unimpeachable of waste, and be afterwards settled on one for life, with remainder over, although the tenant for life is not expressly declared to be unimpeachable of waste, he will be so treated as between himself and those claiming the rest of the term (*b*).

Limitation to tenant for life without impeachment of waste made subject to trustee for a term.

The limitation to a tenant for life without impeachment of waste is sometimes made by the settlement subject to a power in trustees for a term to enter and cut timber. In a case where a discretionary power to this effect was vested in trustees for a term, the Court protected them in the exercise of their power, there being an absence of all *malæ fides*, or of any wanton or unreasonable exercise of their discretion (*c*). So also where

(*y*) 22 Beav. 380; 25 L. J. Ch. 589; 111 R. R. 402.

(*z*) *Marquis of Downshire* v. *Sandys*, 6 Ves. 107, 114.

(*a*) *Garth* v. *Cotton*, 3 Atk. 751; 1 Ves. Sen. 524, 546; 1 Dick. 183.

(*b*) *Bridges* v. *Stephens*, 2 Sw. 150, n.; 23 R. R. 217. See *Marquis of Downshire* v. *Sandys*, 6 Ves. 107.

(*c*) *Kekewich* v. *Marker*, 3 Mac. & G. 311; 21 L. J. Ch. 182; 87 R. R. 99.

the limitation to a tenant for life without impeachment of waste was subject to the power in trustees with the consent of the tenant for life, to cut timber for the purpose of paying off a mortgage debt, the Court, upon the construction of the settlement, restrained the tenant for life from cutting timber for his own benefit (*d*).

Tenant for life without impeachment of waste may not gain any undue advantage from the exercise of a power of sale or exchange or purchase.

A tenant for life without impeachment of waste will not be permitted to gain any undue advantage from the exercise of a power or trust for sale or exchange of the settled estates. Thus in *Lady Plymouth* v. *Archer* (*e*), lands were devised upon trust for sale, the produce to be invested in other lands to be purchased and to be to the use of Lord Archer for life without impeachment of waste, with remainders over, and there was a declaration that the rents and profits of the lands, until sold, were to be to the use of the person entitled to the estate to be purchased. Lord Archer was held not entitled to cut timber on the lands devised, because, as he would have a right to cut timber on the estate to be bought, that would be giving him double waste. In a case, *Burges* v. *Lamb* (*f*), before Lord Eldon, trustees for the purchase of real estate were made successively tenants for life without impeachment of waste of the estate to be purchased. An estate having been purchased with a disproportionate quantity of timber upon it, the question was whether the monies had been properly laid out, and whether an injunction could be sustained against the first tenant for life in cutting timber. This question Lord Eldon would not decide, the frame of the record not being such as to bring it properly before him; but he said that if the timber bore a very considerable proportion to the value of the whole purchase, the tenant for life, who was one of the trustees, could not be permitted to cut it (*g*).

Waste by collusion.

A tenant for life in remainder without impeachment of waste, may not commit waste before his own estate has fallen into possession by leave of a tenant for life in possession who

(*d*) *Briggs* v. *Earl of Oxford*, 5 De G. & Sm. 156; 1 De G. M. & G. 363; 21 L. J. Ch. 829; 91 R. R. 117.

(*e*) 1 Bro. C. C. 159.

(*f*) 16 Ves. 174; 10 R. R. 150.

(*g*) Ib. 16 Ves. 187; 10 R. R. 160.

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is impeachable for waste (*h*). So also the Court will interfere by injunction if the tenant for life and the remainderman in fee, subject to contingent estates, are committing waste in collusion (*i*), or where waste is being committed by a tenant for life in possession, who has the next vested estate of inheritance in remainder, but subject to intermediate contingent estates (*k*).

Estate for life under executory trust.

Judicature Act, 1873, s. 25, sub-s. 3.

Where a settlement is directed to be executed for the purpose of carrying out an executory trust, the estate of the tenant for life will not as a rule be made dispunishable for waste (*l*); but it is otherwise in cases where the trust is executed by cutting down words of inheritance to an estate for life in the first taker (*m*).

Timber cut under order of the Court.

The Court will order ornamental timber, or timber which forms a shelter or defence to a mansion house to be felled, where it is decaying or injurious to adjoining trees, or where it is necessary for the well-being, salubrity, and comfort of the mansion-house that it should be cut, or where any other sufficient reason can be shown why it should be cut (*n*). A tenant for life without impeachment of waste who commits equitable waste will not be allowed to derive any benefit therefrom (*o*); unless it appear that the timber so cut by him is such as the Court would upon a proper application have directed to be cut for the preservation and improvement of the remaining ornamental timber, in which case he will be allowed to retain the proceeds of sale of the same (*p*).

(*h*) *Lady Evelyn's case*, cited 2 Freem. 55; 2 Saw. 172; Dick. 209; *Fleming* v. *Bishop of Carlisle*, cited Dick. 209.

(*i*) *Garth* v. *Cotton*, 1 Dick. 183; 1 Ves. Sen. 524, 548; 3 Atk. 751.

(*k*) *Williams* v. *Duke of Bolton*, 1 Cox, 72; 4 R. R. 21; *Birch Wolfe* v. *Wolfe*, 9 Eq. 683; 39 L. J. Ch. 345.

(*l*) *Davenport* v. *Davenport*, 1 H. & M. 775; *Stanley* v. *Coulthurst*, 10 Eq. 259; 39 L. J. Ch. 650.

(*m*) Ib. See *Bankes* v. *Le Despencer*, 10 Sim. 576; 11 Sim. 508; 9 L. J. (N. S.) Ch. 185; 51 R. R. 313.

(*n*) See *Campbell* v. *Agoud*, 17 Beav. 623; *Att.-Gen.* v. *Duke of Marlborough*, 5 Madd. 280; 18 R. R. 273; *Lushington* v. *Boldero*, 6 Madd 149; 22 R. R. 261; *Ford* v. *Tynte*, 2 De G. J. & S. 127, 129; *Baker* v. *Sebright*, 13 C. D. 179, 184; 49 J. Ch. 65.

(*o*) *Lushington* v. *Boldero*, 15 Beav. 1, 7; 21 L. J. Ch. 51; *Wellesley* v. *Wellesley*, 6 Sim. 497; 38 R. R. 181.

(*p*) But as to the right of the remainderman to require the cutting to be done under the supervision of the Court, see *infra*.

SECTION 5.—INTEREST AND PROPERTY IN SEVERED TIMBER, ETC.—ACCOUNT.

Although a tenant for life unimpeachable for waste will be allowed to keep the proceeds of ornamental timber cut by him where the timber so cut is such as the Court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber it does not follow that the Court will not, at the instance of the remainderman grant an injunction to restrain the tenant for life from cutting ornamental timber which it has become necessary and proper to cut, and direct that the cutting be done under its supervision. The remainderman has a right to the protection of the Court to prevent the tenant for life from cutting it improperly.

Right of remainderman to require cutting to be done under supervision of Court.

In one case (*r*) an injunction was granted restraining a person who had committed waste by cutting timber, from carrying the timber away: but it seems doubtful whether this is sound law, though perhaps in a very exceptional case, an injunction might be granted on the ground of irreparable mischief. An injunction might, however, it appears be granted to restrain the carrying away of timber standing at the time of process served.

The produce of mines, the getting of which is waste, belongs, as in the case of timber, to the owner of the first estate of inheritance (*t*). Compensation money paid by a corporation for minerals which previously have been got by the tenant for life as such does not belong immediately to the tenant for life, but must be apportioned between the tenant for life and the remainderman the number of years which the mine is expected to be worked out being ascertained and the compensation money divided into as many equal parts, one of such parts being paid to the tenant for life each year (*u*).

Property in severed minerals.

(*q*) *Baker* v. *Sebright*, 13 Ch. D. 179; 41 L. J. Ch. 65.

(*r*) *Anon.*, 1 Ves. sen. 92.

(*s*) *Robinson* v. *Hunter*, 5 Johns. Ch. (Amer.) 158.

(*t*) *Whitfield* v. *Bewit*, 2 P. Wms. 240; *Garrick* v. *Whitfield*, 3 P. Wms. 267; *Re Barrington*, 33 C. D. 527; 56 L. J. Ch. 175.

(*u*) *Re Robinson's Settlement*, (1891) 3 Ch. 129, 133; 60 L. J. Ch. 776; and see *Re Fullerton*, (1906)

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Account.

In all cases in which an action for an injunction will lie to restrain future waste, a Court of equity will, upon the principle of preventing a multiplicity of suits, give an account of past waste (*x*), but where from the determination of the estate of the wrongdoer, or some other reason, there is nothing on which the injunction can operate, and complete relief can be had in damages, an action for an account will not, as a general rule, lie (*y*). In a case where a tenant for life was executrix of a preceding tenant for life, both being impeachable for waste, and both having committed waste, although an injunction and account were granted against the existing tenant for life, it was yet held that, as no injunction could be granted against the preceding tenant for life, an account could not be ordered against her executrix for waste committed by the preceding tenant for life (*z*). But if the waste were of such a nature, that there was no remedy at law, and a wrong would be sustained, if equity did not interfere, an action for an account would lie, although an injunction might not be competent. Thus in *Garth* v. *Cotton* (*a*), a decree for an account of timber was made against the assets of a remainderman in fee, who had colluded with the tenant for life in cutting timber before the birth of a contingent remainderman. So, also, in cases of equitable waste, an action for an account will lie against the assets of a deceased wrongdoer, though an injunction is not competent (*b*).

Mines and collieries, being a species of trade (*c*), an account of profits will in all cases be granted, without reference to the

2 Ch. 138; 75 L. J. Ch. 555; cf. *Re Barrington, Gamlon* v. *Lyon*, 33 C. D. 523; 56 L. J. Ch. 175.

(*x*) *Jesus College* v. *Bloom*, 3 Atk. 263; Amb. 54; *Parrott* v. *Palmer*, 3 M. & K. 632; 41 R. R. 149.

(*y*) *Jesus College* v. *Bloom*, 3 Atk. 263; Amb. 54; *Grierson* v. *Eyre*, 9 Ves. 346; *Parrott* v. *Palmer*, 3 M. & K. 632, 640, 642; 44 R. R. 149.

(*z*) *Higginbotham* v. *Hawkins*, 7 Ch. 676; 41 L. J. Ch. 828.

(*a*) 3 Atk. 751; 1 Ves. Sen. 524, 546; 1 Dick. 183.

(*b*) *Marquis of Lansdowne* v. *Marchioness of Lansdowne*, 1 Madd. 116; 15 R. R. 225; *Duke of Leeds* v. *Lord Amherst*, 2 Ph. 117; 15 L. J. Ch. 351; 78 R. R. 47; *Morris* v. *Morris*, 3 De G. & J. 323; 28 L. J. Ch. 329; *Blake* v. *Peters*, 1 De G. J. & S. 345; 32 L. J. Ch. 200. See *Phillips* v. *Homfray*, (1892) 1 Ch. 465, 471; 61 L. J. Ch. 210.

(*c*) *Jeffries* v. *Smith*, 1 Jac. & W. 298, 302; 21 R. R. 175.

question whether or not an injunction will lie, or whether or not there is a remedy at law (*d*).

An action for an injunction by the patron of a living to stay waste by an incumbent, or by the Attorney-General to stay waste by a bishop, should not pray for an account of the profits for their own benefit as patrons (*e*).

Account between tenants in common.

If one co-owner of land derives gain by committing destructive waste on the common property, he is liable to account to the other owners for their shares of the money so obtained (*f*). The tenant in common of a mine is accordingly entitled to an account of the monies produced by working the mine (*g*). But in taking the account the tenant in common who works the mine is allowed to deduct from the value of the minerals in account with his co-tenants the cost of severance and bringing the minerals to the pit's mouth (*h*). A tenant in common in occupation of an estate is not liable to account for waste in cutting timber which falls short of destructive waste (*i*).

Account limited to monies actually received.

The account is limited to the monies actually received and the profits actually made by the wrongdoer. There can be no account in respect of acts unattended by profit. When, accordingly, equitable waste had been committed by a tenant for life without impeachment of waste in pulling down a mansion-house, and building a new house with the materials of the old one on another part of the estate, but it did not appear that any profit had been derived from the sale of the materials, the Court held that an account could not be had against the assets of the deceased tenant for life (*k*). The case would have been otherwise, if he had sold the materials and received the

(*d*) *Jesus College* v. *Bloom*, 3 Atk. 263; Amb. 54; *Thomas* v. *Oakley*, 18 Ves. 184; 11 R. R. 181; *Parrott* v. *Palmer*, 3 M. & K. 642; 41 R. R. 149; *Elias* v. *Griffith*, 8 C. D. 521, 525, 526.

(*e*) *Knight* v. *Moseley*, Amb. 176.

(*f*) Co. Litt. 200 b; *Martin* v. *Knowlys*, 8 T. R. 145. See *Twort* v. *Twort*, 16 Ves. 128; 10 R. R. 141; and *Job* v. *Potton*, 20 Eq. 93; 44 L. J. Ch. 262.

(*g*) See *Bentley* v. *Bates*, 4 Y. & C. Ex. Eq. 182; 9 L. J. (N. S.) Ex. Eq. 30; 54 R. R. 465. See also *Clegg* v. *Clegg*, 3 Giff. 322; *Denys* v. *Schuckburgh*, 4 Y. & C. Ex. p. 42; 54 R. R. 446.

(*h*) *Job* v. *Potton*, 20 Eq. 84, 97; 44 L. J. Ch. 262.

(*i*) *Griffies* v. *Griffies*, 8 L. T. 758; 11 W R. 943.

(*k*) *Morris* v. *Morris*, 3 De G. & J. 323; 28 L. J. Ch. 329.

profits (*l*). So also a tenant for life will not be charged with sums produced by technical acts of waste which have improved the land (*e.g.*), cutting and selling turf (*m*). Credit also will be given in taking the account for the application of the proceeds of waste by the tenant for life in permanent improvements (*n*).

a case for account be made out, the law will not inquire whether or not the act complained of was a sound exercise of discretion.

If a case for account be made out, the Court cannot inquire whether the act complained of was or was not a sound exercise of discretion with reference to the state of the property and to the interests of the family to which it belongs (*o*).

Remainderman for life.

A mesne remainderman for life, although entitled to an injunction to protect his enjoyment, has no interest to call for an account (*p*).

Damages for equitable waste.

When ornamental timber has been felled and the reversioner claims damages from the tenant for life in respect of such equitable waste, the amount of damage can only be measured by the damage done to the inheritance (*q*).

Statute of Limitations.

In the case of legal waste, the Statute of Limitations begins to run against the remainderman from the time the waste is committed, and (in the absence of disability or acknowledgment) the action will be barred by the statute 21 Jac. 1, c. 16, at the end of six years (*r*). Where, however, the tenant for life is also owner of the first estate of inheritance, time will not run until his death (*s*). In the case of equitable waste, time does not run against the remainderman until his estate falls into possession, and the action must then be brought within twelve years (*t*).

(*l*) *Morris* v. *Morris*, 3 De G. & J. 328; 28 L. J. Ch. 329.

(*m*) *Harris* v. *Ekins*, 20 W. R. 999; 26 L. T. 827.

(*n*) *Birch Wolfe* v. *Birch*, 9 Eq. 683; 39 L. J. Ch. 345.

(*o*) *Duke of Leeds* v. *Lord Amherst*, 2 Ph. 117, 123; 15 L. J. Ch. 351; 78 R. R. 47.

(*p*) *Pigot* v. *Bullock*, 1 Ves. Jun. 479; 3 Bro. C. C. 538; 2 R. R. 148. See *Gent* v. *Harrison*, John. 524; 29 L. J. Ch. 70.

(*q*) *Bubb* v. *Yelverton*, *Ex parte Hastings*, 10 Eq. 465; 40 L. J. Ch. 38.

(*r*) *Seagram* v. *Knight*, 2 Ch. 628; 36 L. J. Ch. 918; *Higginbotham* v. *Hawkins*, 7 Ch. 676; 41 L. J. Ch. 828; and see *Birch Wolfe* v. *Birch*, 9 Eq. 683; 39 L. J. Ch. 345; *Simpson* v. *Simpson*, 3 L. R. Ir. 308; *Dashwood* v. *Magniac*, (1891) 3 Ch. p. 387; 60 L. J. Ch. p. 832, *per* Kay, L.J.

(*s*) *Birch Wolfe* v. *Birch*, L. R. 9 Eq. 683; 39 L. J. Ch. 345.

(*t*) *Duke of Leeds* v. *Amherst*, 2

If, however, there has been long delay in bringing the action, the Court will usually endeavour to deal liberally with the estate of a deceased tenant for life, inasmuch as, in many cases, it would not be for the benefit of the parties concerned to go into a long and expensive inquiry on the subject (*u*).

Delay.

Actions for an injunction to stay waste should not be brought to a hearing when no account is sought, or the account is waived, and the defendant does not dispute the right of the plaintiff to have the injunction continued, or offers to submit to the injunction with costs (*x*).

Perpetual injunction. Costs.

The right of action for damages for waste is in respect of a tort, and is therefore not assignable (*y*).

Right of action for damages not assignable.

SECTION 6.—CERTAIN STATUTORY ENACTMENTS AFFECTING THE LAW IN REGARD TO WASTE.

The statements made in the previous pages of this chapter in regard to the law of waste, must be read as modified by various recent statutes.

For example, under the *Settled Estates Act*, 1877 (*a*), the Court may authorise leases of any settled estate, or of any rights or privileges over or affecting any settled estate for any purpose, whether involving waste or not, subject to the conditions therein mentioned (*b*).

Settled Estates Act, 1877.

Ph. 117; 15 L. J. Ch. 351; 78 R. R. 47; *Dashwood* v. *Magniac*, (1891) 3 Ch. p. 386; 60 L. J. Ch. p. 831; Real Property Limitation Act, 1833, ss. 2, 3, 24; Real Property Limitation Act, 1874, s. 2.

(*u*) *Bagot* v. *Bagot*, 32 Beav. 509, 519; 33 L. J. Ch. 116. But see *Duke of Leeds* v. *Lord Amherst*, 20 Beav. 239; 15 L. J. Ch. 351; 78 R. R. 47. See also *Bagot* v. *Bagot*, 32 Beav. 509, 521, 522; 33 L. J. Ch. 116, as to accounts and inquiries in a case of waste, both in timber and mines, presenting a great complication of circumstances. See also *Tooker* v. *Annesley*, 5 Sim. 235; 53 R. R. 64, for the form of inquiry as to timber.

(*x*) *Harvey* v. *Ferguson*, 15 Ir. Ch. R. 7; *Dunsany* v. *Dunne*, ib., 278.

(*y*) *Defries* v. *Milne*, (1913) 1 Ch. 98; 82 L. J. Ch. 1.

(*a*) 40 & 41 Vict. c. 18.

(*b*) Sect. 4.

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Under this Act, the Court may also authorise timber (other than ornamental timber) growing on a settled estate to be sold (*c*), and may authorise part of the settled estate to be laid out for streets, roads, and other works (*d*).

Settled Land Acts, 1882, 1890.

Under the *Settled Land Act*, 1882, a tenant for life may, without any leave of the Court (*inter alia*), grant building or mining leases (*e*), and in the latter case, whether the mines be already opened or not (*f*). But unless a contrary intention is expressed in the settlement, part of the rent, in the case of a mining lease, is to be set aside as capital; namely, where the tenant for life is impeachable for waste three-fourths, otherwise one-fourth (*g*).

In connection with a sale or grant for building purposes, or a building lease, the tenant for life, for the benefit of the residents on the settled land, may cause any part of the land to be laid out for streets, roads, squares, gardens, or other open spaces (*h*). The Act also authorises capital money to be expended in various improvements on the settled land (*i*), and the tenant for life and persons employed by him may enter on the settled land, and without impeachment of waste execute any improvement authorised by the Act, or inspect and repair the same, and for the purposes thereof may (*inter alia*) get and work limestone and other substances, and may cut and use timber not left standing for shelter or ornament (*k*).

Section 35 provides that where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell such timber. Three-

(*c*) Sect. 16.

(*d*) Sect. 20.

(*e*) 45 & 46 Vict. c. 38, s. 6, and Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 8. See *In re Aldam's Settled Estate*, (1902) 2 Ch. 46; 71 L. J. Ch. 552.

(*f*) Sect. 2, sub-sect. 10 (iv.). See *Sitwell* v. *Earl Londesborough*, (1905) 1 Ch. 460; 74 L. J. Ch. 254, as to the power of tenant for life to grant a lease of a right to let down the surface of the land by mining operations.

(*g*) Sect. 11.

(*h*) Sect. 16.

(*i*) Sects. 25, 26, and 21 (iii.); and see sect. 13 of S. L. Act, 1890.

(*k*) Sect. 29.

fourths of the net proceeds of sale shall be set aside as capital, and the remaining fourth shall go as rents and profits.

By section 28 (2) it is provided that a tenant for life, and his successors in title, who have under the settlement merely a limited estate or interest in the settled land, shall not cut down any trees planted as an improvement under the Act except in proper thinning.

Agricultural Holdings Act, 1908.

The *Agricultural Holdings Act*, 1908, provides (*l*) that a tenant of a holding (*m*) shall be entitled notwithstanding any custom of the country, or the provisions of any contract of tenancy or agreement respecting the method of cropping of arable lands or the disposal of crops, to practise any system of cropping of arable land on the holding, and to dispose of the produce of the holding, provided suitable and adequate provision be made to protect the holding from injury or deterioration in manner therein mentioned. The enactment however does not apply in the case of a tenancy from year to year, as respects the year before the tenant quits the holding, or any period after he has given or received notice to quit which results in his quitting the holding, or in any other case, as respects the year before the expiration of the contract of tenancy. It is also provided that if the tenant exercises his rights under the section in such a manner as to injure or deteriorate the holding, or to be likely to injure or deteriorate the holding, the landlord shall, without prejudice to any other remedy which may be open to him, be entitled to recover damages in respect of such injury or deterioration at any time, and, should the case so require, to obtain an injunction restraining the exercise of the rights under the section in that manner. It is also provided (*n*) that where any engine,

(*l*) 8 Edw. 7, c. 28, s. 26.

(*m*) Sect. 48. Holding is defined as "any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord."

(*n*) Sect. 21. The section applies to a fixture or building acquired since the 31st December, 1900, by a tenant in like manner as it applies to a fixture or building affixed or erected by a tenant, but does not

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machinery, fencing or other fixture is affixed to a holding by a tenant, and any building is erected by him thereon for which he is not under the Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the determination of the tenancy on the conditions therein mentioned.

It is also provided (*o*) that except as in the Act expressed, nothing in the Act shall prejudicially affect any power, right, or remedy, of a landlord, tenant, or other person, vested in or exerciseable by him by virtue of any other Act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy, or other contract, or of any waste, tillages, away-going crops, fixtures or other thing.

Small Holdings and Allotments Act, 1908.

The *Small Holdings and Allotments Act*, 1908 (*p*) enables a tenant of any small holding or allotment (*q*) before the expiration of his tenancy to remove any fruit and other trees and bushes planted or acquired by him, and also certain buildings for which he has no claim for compensation.

apply to any fixture or building affixed or erected before the 1st January, 1884 (sub-sect. 2).

See also sect. 42, sub-sects. (ii.), (iii.), which extend the provisions of sect. 21 to the tenants of market gardens, as to removal of fixtures and enables such tenants also to remove fruit trees on certain conditions.

(*o*) Sect. 46.

(*p*) 8 Edw. 7, c. 36, s. 47 (4).

(*q*) Sect. 61 (1).

CHAPTER V.

INJUNCTIONS AGAINST TRESPASS.

Jurisdiction.

THE jurisdiction of a Court of equity to grant injunctions against trespass is comparatively of modern establishment(*a*). The Court for a long time confined relief in equity to waste, founding its interference on the privity of title between the parties (*b*). The rigour of the old rule in confining relief in equity to waste, was relaxed for the first time by Lord Thurlow in a case where, the party complaining being in possession of a close, a wrongdoer was working into his minerals, and taking away the very substance of his estate (*c*). In relaxing the rule Lord Thurlow acted with reluctance, and was influenced solely by the irreparable and destructive injury which would have followed the refusal (*d*). The principle established by Lord Thurlow in *Flamang's case* was approved by Lord Eldon, and followed by him in some cases, but the law on the subject was left by him in an unsatisfactory state. Succeeding judges have, on more than one occasion, pointed this out, and have felt much difficulty in finding the principle upon which to act in each case as it arose.

The state of the law, and the various authorities, were reviewed with much care by Kindersley, V.-C., in *Lowndes* v. *Bettle* (*e*), who classified the cases under two heads: the one, where the party against whom the application for the injunction is made is in possession; and the other, where the plaintiff is in possession and is asking the Court to protect his estate.

(*a*) 3 Ra. Ca. 355.

(*b*) *Davenport* v. *Davenport*, 7 Ha. 217; 18 L. J. Ch. 163; 82 R. R. 76; *Lowndes* v. *Bettle*, 33 L. J. Ch. 451.

(*c*) *Flamang's case*, cit. 6 Ves. 147; 7 Ves. 308; 8 Ves. 90; 18 Ves. 186.

(*d*) 7 Ves. 308; 18 Ves. 186; *Talbot* v. *Hope Scott*, 4 K. & J. p. 122; 27 L. J. Ch. 273; 116 R. R. 271.

(*e*) 33 L. J. Ch. 451. See *Fitzhardinge* (*Lord*) v. *Purcell*, (1908) 2 Ch. p. 145; 77 L J. Ch. p. 534.

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In what cases an injunction would be granted against trespass.

The result of the cases (apart from the alteration made by the Judicature Act, 1873) was that where the plaintiff was *out of possession* the Court would refuse to interfere by granting an injunction unless there was fraud or collusion, or unless the acts perpetrated or threatened were so injurious as to tend to the destruction of the estate (*f*). Where the plaintiff was *in possession* and the defendant was a *mere trespasser* not claiming under colour of right, the tendency of the Court was not to grant an injunction, in the absence of special circumstances, but to leave the plaintiff to his remedy at law; although an injunction would be granted if the acts complained of tended to the destruction of the estate. But where the plaintiff was in possession and the defendant *claimed under* an *adverse title*, the tendency was to grant the injunction (*g*).

Judicature Act, 1873, s. 25, sub-s. 8.

The distinction, however, which has been taken between the cases where the defendant committing the acts of trespass or spoliation complained of is or is not in possession, and claims under colour of title, or is a mere stranger, is not now of the same importance; for by sect. 25, sub-sect. 8 of the Judicature Act, 1873, it is provided that:—

"... if an injunction is asked, either before or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if out of possession) does or does not claim the right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or either of the parties are legal or equitable."

Lowndes v. Bettle.

In *Lowndes* v. *Bettle* (*h*), the plaintiff and his ancestors had

(*f*) See *Talbot* v. *Hope Scott*, 4 K. & J. 108; 27 L. J. Ch. 273; 116 R. R. 271; *Neale* v. *Cripps*, 4 K. & J. 472; 116 R. R. 413; and the other cases cited by Kindersley, V.-C., in *Lowndes* v. *Bettle*, 33 L. J. Ch. 451. See also *Stanford* v. *Hurlstone*, 9 Ch. 116.

(*g*) See *Lowndes* v. *Bettle*, 33 L. J. Ch. 451, 457; and *Fitzhardinge* (*Lord*) v. *Purcell*, (1908) 2 Ch. p. 145; 77 L. J. Ch. p. 534.

(*h*) 33 L. J. Ch. 451. See also *Stanford* v. *Hurlstone*, 9 Ch. 119; *Allen* v. *Martin*, 20 Eq. 462; *Ardley* v. *Guardians of St. Pancras*, 39

been in possession of an estate for eighty years, and the defendant, claiming as heir-at-law, entered upon it, and exercised acts of ownership by cutting sods and felling timber, with the view, as he alleged, of prosecuting his claim as heir under the direction of the Court, Kindersley, V.-C., considering that irremediable damage might result in the event of his refusing to interfere, granted an interim injunction, and afterwards made the injunction perpetual. If the trespass did not amount to destructive trespass, but was a case of mere ordinary naked trespass, the Court of Chancery would not, under the old procedure, interfere by way of injunction (*i*). Thus where a claimant to property had been nonsuited in ejectment, the Court refused to restrain him from vexatiously distraining on or otherwise molesting the tenants (*j*). So, also, where the owner of house property filed a bill for an injunction against a defendant who had been his lessee, but had forfeited his lease, to restrain him from distraining on the tenants, a demurrer for want of equity was allowed (*k*).

Naked trespass.

But under the Judicature Act, 1873, s. 25, sub-s. 8, an injunction may be had to restrain a landlord from exercising his legal right of distress. In *Shaw* v. *Lord Jersey* (*l*) an injunction was granted to restrain a landlord from distraining for rent until the determination of an action brought by the tenants against him to try his right to the rent on the terms that the injunction should be granted for a fortnight, and continued only on the payment of the rent in the meantime into Court. So, also, the Court may now restrain a trespass by injunction in cases where there has been no destructive trespass. A lessor accordingly, who, in the absence of a power to enter upon the demised premises to repair them on breach of the lessee's covenant to repair, entered for the purpose of executing repairs, was restrained by injunction, even though

Injunction granted though no destructive trespass.

L. J. Ch. 871; *Leeds Navigation Co.* v. *Horsfall*, 33 Sol. Jo. 183.

(*i*) *Garstin* v. *Asplin*, 1 Madd. 152; *Jackson* v. *Stanhope*, 15 L. J. Ch. 446; *Cooper* v. *Crabtree*, 20 C. D. 589; 51 L. J. Ch. 544.

(*j*) *Best* v. *Drake*, 11 Ha. 369. But see *Hodgson* v. *Duce*, 2 Jur. N. S. 1014.

(*k*) *Aldis* v. *Fraser*, 15 Beav. 220; 92 R. R. 387.

(*l*) 4 C. P. D. 359, affirming 48 L. J. C. P. 308. See *Carter* v. *Salmon*, 43 L. T. 490.

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under a superior lease the lessor was liable to forfeiture for non-repair, and though he entered by leave of a weekly tenant (*m*). So, also, a lessor was restrained by injunction from entering upon the demised premises for the purpose of removing a political poster which the tenant had affixed to the house, the power of entry only being for non-payment of rent or breach of the lessee's covenants (*n*). Where the lessor covenants to repair the demised premises, the covenant carries with it an implied licence to enter upon the premises of the lessee and occupy them for a reasonable time in order to do what is necessary under the covenant (*o*).

When trespass restrained by injunction pending trial of the right.

The jurisdiction of the Court by injunction in cases of trespass is in aid of the legal right. If the right at law is clear and the breach clear, and serious damage is likely to arise to the plaintiff if the defendant is allowed to proceed with what he is doing or threatens to do, an injunction will be granted pending the trial of the right (*p*). But if the right at law is not clear or the breach is doubtful, and no irreparable injury can arise to the plaintiff pending the trial of the right, the case resolves itself into a question of comparative convenience (*q*).

Injunction in trespass not a matter of course.

Although actual damage need not be proved to support an action for trespass (*r*), and rights of property as a general proposition are entitled to protection by, if necessary, an injunction, the Court will not grant relief by an injunction where the trespass is trifling, and causes no appreciable injury to the plaintiff (*s*), for an injunction in trespass is not a matter of course (*t*). Thus in a recent case (*u*), where the

(*m*) *Stocker* v. *Planet Building Society*, 27 W. R. 877. See *Barker* v. *Barker*, 3 C. & P. 557.

(*n*) *Yelloly* v. *Morley*, (1910) 27 T. L. R. 20.

(*o*) *Sauer* v. *Bilton*, 7 C. D. 824.

(*p*) See *Clowes* v. *Beck*, 13 Beav. 347; 20 L. J. Ch. 505; *Lowndes* v. *Bettle*, 33 L. J. Ch. 451; *Allen* v. *Martin*, 20 Eq. 466.

(*q*) *Ante*, pp. 26–28.

(*r*) *Rogers* v. *Spence*, 13 M. & W. 581; 15 L. J. Ex. 49; see *King* v. *Brown, Durrant & Co.*, (1913) 2 Ch. 416 (trespass by commoner).

(*s*) *Saunders* v. *Smith*, 3 M. & C. 711; 7 L. J. Ch. 227; *Cooper* v. *Crabtree*, 20 C. D. 589; 51 L. J. Ch. 189; *Llandudno District Council* v. *Wood*, (1899) 2 Ch. 705; 68 L. J. Ch. 623; *Behrens* v. *Richards*, (1905) 2 Ch. 614; 74 L. J. Ch. 615.

(*t*) *Waterhouse* v. *Waterhouse*, (1906) 94 L. T. 131; 22 T. L. R. 195.

(*u*) *Behrens* v. *Richards*, *supra*.

plaintiff had purchased land on an unfrequented part of the coast, and had fenced in some footpaths over the land which the defendants claimed to use as being public highways, the Court refused to grant an injunction restraining the defendants from removing the plaintiff's fences, on the ground that the plaintiff was not injured by the then slight public user of the paths, and by way of relief made a declaration in the plaintiff's favour that the paths were not highways, and awarded him nominal damages for the trespass.

Continuing trespass.

In the case of trespass of a continuing nature, however, the Court will generally interfere by injunction (*v*), and the Court will interfere by injunction where the trespass, although not of a continuing nature, is serious, or threatened to be repeated (*x*).

Erection of buildings.

If the act complained of consists in the erection of works or buildings on the land of the plaintiff, an injunction may be had as long as the works are in an incomplete state; but if the works or buildings have been completed before action, the Court will generally leave the plaintiff to his remedy in damages (*y*). If, however, the conduct of the defendant has

(*v*) *Goodson* v. *Richardson*, 9 Ch. 221, 227; 43 L. J. Ch. 790, 791; *Allen* v. *Martin*, 20 Eq. 465; *Ardley* v. *Guardians of St. Pancras*, 39 L. J. Ch. 871; *Eardley* v. *Lord Granville*, 3 C. D. 826; 45 L. J. Ch. 669; *Battersea Vestry* v. *County of London and Brush, etc., Co.*, (1899) 1 Ch. 474; 68 L. J. Ch. 240; *London and North Western Railway Co.* v. *Westminster Corporation*, (1902) 1 Ch. 269; 71 L. J. Ch. 34; (1905) A. C. 426; 75 L. J. Ch. 629; *Marriott* v. *East Grinstead Gas and Water Co.*, (1909) 1 Ch. 79; 78 L. J. Ch. 144; *Schweder* v. *Worthing Gas Light and Coke Co.*, (1912) 1 Ch. 83, 90; 81 L. J. Ch. 102; *King* v. *Brown, Durrant & Co.*, note (*r*), *supra*.

(*x*) See *Harrison* v. *Duke of Portland*, (1893) 1 Q. B. p. 154; 62 L. J. Q. B. p. 126; *Battersea Vestry* v. *County of London and Brush Co.*, (1899) 1 Ch. 483, 484; 68 L. J. Ch. 240; *Hickman* v. *Maisey*, (1900) 1 Q. B. 752; 69 L. J. Q. B. 511; *Staffordshire and Worcestershire Canal Navigation* v. *Bradley*, (1912) 1 Ch. 95; 81 L. J. Ch. 147; *Lewis* v. *Meredith*, (1913) 1 Ch. 571; 108 L. T. 349; *Hope* v. *Osborne*, (1913) 2 Ch. 349; *King* v. *Brown, Durrant & Co.*, note (*r*), *supra*. As to when an intended repetition of an act will be inferred, see *Phillips* v. *Thomas*, 62 L. T. 793; *Dunlop Pneumatic Tyre Co.* v. *Neal*, (1899) 1 Ch. 807; 68 L. J. Ch. 378.

(*y*) *Deere* v. *Guest*, 1 M. & C. 516; 6 L. J. Ch. 69; *Moreland* v. *Richardson*, 22 Beav. p. 604; 25 L. J. Ch. p. 887; 111 R. R. 501. See *Schweder* v. *Worthing Gas Light and*

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been fraudulent, vexatious or oppressive, and the trespass is of so serious a nature that the parties cannot be placed in the position in which they were before the acts were committed, without the interference of the Court, the Court will interfere, even though the act complained of has been completed (*z*).

Parent and child.

The Court will in a very grave case grant an injunction at the instance of a parent to restrain a son from entering his parent's house (*a*).

Municipal Corporation meetings.

In a recent case (*b*) an injunction was granted restraining a local newspaper proprietor, who was also a burgess and ratepayer, from attending meetings of the borough council, on the ground that such meetings were not public, and that a person who was not a member of the council had no right to attend such meetings, either as a member of the public generally, or as a burgess and ratepayer, or as a representative of the Press. But it is now provided (*c*) that representatives of the Press are to be entitled to be present at the meetings of a local authority, subject to the right of the local authority to temporarily exclude them when such exclusion is advisable in the public interest.

Trespass when justifiable.

A trespass may be justifiable, if in the circumstances it was reasonably necessary for the preservation of the defendant's property from a real and imminent danger, even though it subsequently appears that the defendant's act was not in fact actually necessary (*d*).

The Court will, in a proper case, interfere by mandatory

Coke Co., supra; Lewis v. *Meredith, supra.*

(*z*) See *ante*, pp. 44—46.

(*a*) *Stevens* v. *Stevens*, (1907) 24 T. L. R. 20 (injunction granted); *Waterhouse* v. *Waterhouse*, (1906) 94 L. T. 134 (injunction refused).

(*b*) *Tenby Corporation* v. *Mason*, (1908) 1 Ch. 457; 77 L. J. Ch. 230.

(*c*) 8 Edw. 7, c. 43, ss. 1 and 6; and see sect. 5 as to the admission of the public. As to parish meetings, see 56 & 57 Vict. c. 73, s. 2, Schedule I., pt. 2 (13).

(*d*) *Cope* v. *Sharpe* (*No.* 2), (1912) 1 K. B. 496; 81 L. J. K. B. 346. See 5 Edw. 7, c. 11, s. 2, which gives a railway company power to enter on a person's land and do all things "reasonably necessary" for the purpose of extinguishing or arresting the spread of fires caused by sparks from their engines. See also *Greywensteyn* v. *Hattingh*, (1911) A. C. 355; 80 L. J. P. C. 158, as to right of landowner to protect his land by driving off a swarm of locusts.

injunction against trespass (*e*). If the trespass or damage is complete and the title is a pure legal title, the Court would not in general interfere by way of mandatory injunction, there being a full remedy at law by ejectment (*f*). But if the damage is serious, or the trespass is of a continuing nature, the Court may interfere by way of mandatory injunction, notwithstanding the existence of a remedy at law (*g*).

In a case where the plaintiffs had made out their right at law to build a bridge over the defendants' railway, and as a temporary easement to erect poles and other temporary obstructions upon land adjacent to the defendants' railway, and the defendants had, in order to prevent the plaintiffs from so temporarily using their land, built up a wall which effectually prevented the plaintiffs from carrying on their works, a mandatory injunction was granted restraining the defendants from continuing to use the wall and from preventing the plaintiffs from making the bridge (*h*). So, also, where water pipes (*i*), and electric light standards (*j*), and gas mains (*k*), had, without the consent of the owner of the soil, been laid

(*e*) See *ante*, pp. 42—46, as to mandatory injunctions.

(*f*) *Here* v. *Guest*, 1 M. & C. 516; 5 L. J. Ch. 69; *Moreland* v. *Richardson*, 22 Beav. 604; 25 L. J. Ch. 883; 111 R. R. 501; see *Att.-Gen.* v. *Manchester and Leeds Railway Co.*, 1 Rr. Ca. 436, and *Goodson* v. *Richardson*, L. R. 9 Ch. 221; 43 L. J. Ch. 790.

(*g*) *Martyr* v. *Lawrence*, 2 De G. J. & S. 261; *London and North Western Railway Co.* v. *Lancashire and Yorkshire Railway Co.* 4 Eq. 174; 36 L. J. Ch. 479; and see *Goodson* v. *Richardson*, 9 Ch. 221; *London and North Western Railway Co.* v. *Westminster Corporation*, (1902) 1 Ch. 269; 71 L. J. Ch. 34; S. C. (1905) A. C. 426; 74 L. J. Ch. 629; *Marriott* v. *East Grinstead Gas and Water Co.*, (1909) 1 Ch. p. 79; 78 L. J. Ch. 144; *Andrews* v. *Abertillery Urban Council*, (1[illegible] Ch. 398, 409; 80 L. J. Ch. [illegible] 747, *infra*; *Kynock & Co.* v. [illegible] *lands*, (1912) 1 Ch. 527; 106 [illegible] 316 (tipping rubbish); *Schweder* [illegible] *Worthing Gas Light and Coke Co.*, (1912) 1 Ch. 83, 90; 81 L. J. Ch. 102.

(*h*) *Great North of England, etc. Junction Railway Co.* v. *Clarence Railway Co.*, 1 Coll. 507. See *Phillips* v. *Treeby*, 8 Jur. N. S. 999.

(*i*) *Goodson* v. *Richardson*, *Marriott* v. *East Grinstead Gas and Water Co.*, *supra*.

(*j*) *Andrews* v. *Abertillery Urban Council*, *supra*.

(*k*) *Schweder* v. *Worthing Gas Light and Coke Co.*, *supra*. In this case the gas main was placed upon the plaintiff's tunnel under a road.

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in the soil of a highway, an injunction was granted to restrain the continuance of the trespass. So, also, a railway company was restrained from permitting trucks or carriages to stand across level crossings so as to obstruct or impede the user of them by the plaintiff (*l*). So, also, parties were restrained from continuing to put a tramway upon a road (*m*). So, also, a man was restrained from leaving logs of timber on premises of which he had agreed to give up possession at the end of his lease, and from which he was evicted by a writ of possession (*n*). So, also, where the lessees of a coal mine had made apertures to ventilate the mine through the land of the plaintiff, and had mortgaged their interest in the mine to the defendants, who began to work the mine and continued to use the apertures, the Court granted an injunction which was in some respects of a mandatory nature, restraining them from continuing to use the apertures, but declined to grant a mandatory injunction ordering them to fill up the apertures inasmuch as they had not made them (*o*). So, also, a coal-owner who had worked into the mines of his neighbour was restrained from permitting the ways, passages, and apertures made by him to remain open (*p*). So, also, the lessee of a coal mine was restrained from conducting or allowing to pass any water into a neighbouring mine by means of troughs, bore-holes, or air-drifts (*q*). So, also, the trustees of a road were restrained from making an encroachment upon the plaintiff's land by making buttresses, etc. (*r*). So, also, a man was restrained by mandatory injunction from permitting a building which he had erected on the roof of a neighbour's house to remain there (*s*). So, also, a man was restrained

(*l*) *United Land Co.* v. *Great Eastern Railway Co.*, L. R. 10 Ch. p. 592; 44 L. J. Ch. 685.

(*m*) *Neath Canal Co.* v. *Ynisarwed, etc., Colliery Co.*, L. R. 10 Ch. 450. See also *Att.-Gen.* v. *Widnes Railway Co.*, 22 W. R. 607; 30 L. T. 449.

(*n*) *Guinness* v. *Fitzsimons*, 13 L. R. Ir. 73.

(*o*) *Powell* v. *Aikin*, 4 K. & J. 355; 116 R. R. 358.

(*p*) *Bell* v. *Joell*, 1 Set. 563.

(*q*) *Westminster Brymbo Coal, etc., Co.* v. *Clayton*, 36 L. J. Ch. 476. See *Plant* v. *Stott*, 21 L. T. 106.

(*r*) *Holmes* v. *Upton*, 9 Ch. 214, n.

(*s*) *Martyr* v. *Lawrence*, 2 De G. J. & S. 261.

from making such alterations in a building as to cover up a fascia which was parcel of the house of his neighbour (*t*). So, also, a man was restrained at the suit of his wife from continuing in possession of a house which formed part of her separate estate (*u*). So, also, the manager of a business was restrained from excluding the owner of the business from the business premises (*x*). In a case where a wall had been knocked down, the Court would not interfere by way of mandatory injunction so as to order it to be built again, but left the plaintiff to his remedy by damages at law (*y*).

Action of trespass founded on possession.

An action of trespass is founded on possession (*z*), and in order to succeed, the plaintiff must show possession of the lands on which the acts complained of were committed, at the date of such acts. If possession be shown, the defendant is not at liberty to set up the title of a third party unless he justifies what he has done under a licence from such third party. When, however, a plaintiff in trespass not being able to prove actual possession proposes to show possession at law by proving his title to the property, the defendant may, if he can, show that the title is not in the plaintiff, but in some third party (*a*). In an action of trespass the right to sue as against a wrongdoer relates back, after entry into possession, to the time at which the right to enter accrued, so as to give a right of action for a trespass committed between the date of the right to enter and that of the actual entry (*b*).

Who may sue.

An action for trespass is usually brought by the occupier or tenant of the land, whether tenant for years or from year to

(*t*) *Francis* v. *Hayward*, 2 C. L. 179; 52 L. J. Ch. 291.

(*u*) *Green* v. *Green*, 5 Ha. 400, n.; 1 R. R. 151.

(*x*) *Eachus* v. *Moss*, 14 W. R. 327

(*y*) *Doran* v. *Carroll*, 11 Ir. Ch. 379.

(*z*) *Fitzhardinge* (*Lord*) v. *Purcell*, (1908) 2 Ch. p. 145; 77 L. J. Ch. 534. And see *Wallis* v. *Hands*, (1893) 2 Ch. 75; 62 L. J. Ch. 586; *Glenwood Lumber Co.* v. *Phillips*, (1904) A. C. p. 410; 73 L. J. P. C. 64; *Foster* v. *Warblington Urban Council*, (1906) 1 K. B. 671; 75 L. J. K. B. 514; *Kynock & Co.* v. *Rowlands*, (1912) 1 Ch. 527; 106 L. T. 316.

(*a*) *Fitzhardinge* (*Lord*) v. *Purcell*, *supra*.

(*b*) *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, (1905) 2 K. B. 493; 74 L. J. K. B. 799 (action by equitable mortgagees).

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year, whose possession is interfered with, but the owner may sue on the ground of injury to his property, either alone or conjointly with the tenant. In order that a reversioner may maintain an action for trespass, it is necessary that he allege and prove that the wrong complained of is an injury to the reversion, either by being of a permanent nature or as operating as a denial of right (*c*). A mortgagee, after entry into possession, can sue in respect of a trespass to the mortgaged premises committed prior to entry, but after his right of entry arose (*d*). If the act complained of affects the public interest, the remedy is by action in the nature of an information at the suit of the Attorney-General (*e*). The Attorney-General, however, is not a necessary party and should not be joined in proceedings to protect rights of property enjoyed not by the community in general, but only by a limited section of the public, such as the inhabitants of a parish (*f*). A local authority may act as relators in an action brought by the Attorney-

(*c*) *Jackson* v. *Pesked*, 1 M. & S. 234; 14 R. R. 417; *Simpson* v. *Savage*, 1 C. B. N. S. 347; 26 L. J. C. P. 50; 107 R. R. 688; *Bell* v. *Midland Railway Co.*, 10 C. B. N. S. 287; 30 L. J. C. P. 273; *Kidgill* v. *Moor*, 9 C. B. 364; 19 L. J. C. P. 177; 82 R. R. 364; *Simpson* v. *Foley*, 2 J. & H. 555; *Inchbald* v. *Robinson*, 4 Ch. 388, 395; 20 L. T. 259; *Mayfair Property Co.* v. *Johnston*, (1894) 1 Ch. 508, 516; 63 L. J. Ch. 399, 402; *Shelfer* v. *City of London Electric Light Co.*, (1895) 1 Ch. 314, 317; 64 L. J. Ch. 224, 226; *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. p. 713; 73 L. J. Ch. p. 279; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. 393, 404; 80 L. J. Ch. 150.

(*d*) *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, (1905) 2 K. B. 493; 74 L. J. K. B. 799.

(*e*) See *Thorne* v. *Taw Vale Railway Co.*, 13 Beav. 10; *Bermondsey Vestry* v. *Brown*, 1 Eq. 204, 215; *Wallasey Local Board* v. *Gracey*, 36 C. D. 593, 597; 56 L. J. Ch. 739; *Tottenham District Council* v. *Williamson*, (1896) 2 Q. B. 353; 65 L. J. Q. B. 592; *Stoke Parish Council* v. *Price*, (1899) 2 Ch. 277; 68 L. J. Ch. 447; *Devonport* v. *Tozer*, (1903) 1 Ch. 759, 762; 72 L. J. Ch. 411; *Boyce* v. *Paddington Borough Council*, (1903) 2 Ch. 564; 72 L. J. Ch. 32 (reversed on other grounds, (1906) A. C. 1; 75 L. J. Ch. 4); *Watson* v. *Hythe Corporation*, (1906) 22 T. L. R. 245; *Att.-Gen.* v. *Garner*, (1907) 2 K. B. 485, 486; 76 L. J. K. B. 965, 968; *Att.-Gen.* v. *Grand Junction Canal*, (1909) 2 Ch. 505, 517; 78 L. J. Ch. 81; *Att.-Gen.* v. *Birmingham, Tame, etc., Drainage Board*, (1910) 1 Ch. 48; 79 L. J. Ch. 139; *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 495; 27 T. L. R. 581.

(*f*) *Att.-Gen.* v. *Garner*, (1907)

General (*g*). Private persons or local authorities may sue alone even though the act complained of may affect the public interest where their proprietary rights are interfered with, and they can make out a case of special damage, or can show that greater damage is caused to them thereby than is caused to the King's subjects in general (*h*). So, also, where a corporation exceeds its statutory powers and commits a trespass, the owner of property injured can sue and raise the question of *ultra vires* without joining the Attorney-General (*i*). Where an Act of Parliament contains a provision for the special protection of an individual, he may enforce his rights thereunder by an action without either joining the Attorney-General as a party, or showing that he has sustained any particular damage (*j*). Where an illegal act is being committed, which in its nature tends to the injury of the public (such as an interference with a public highway or a navigable river), the Attorney-General, on behalf of the public, can maintain

2 K. B. 480, 487; 76 L. J. K. B. 965, 968.

(*g*) *Att.-Gen.* v. *Logan*, (1891) 2 Q. B. 100; 65 L. T. 162. See *Stoke Parish Council* v. *Price*, (1899) 2 Ch. 277; 68 L. J. Ch. 447; *Devonport Corporation* v. *Tozer*, (1903) 1 Ch. 759, 762; 72 L. J. Ch. 416; *Att.-Gen.* v. *Garner*, (1907) 2 K. B. p. 487; 76 L. J. K. B. p. 968.

(*h*) *Cook* v. *Mayor, etc., of Bath*, 6 Eq. 177; *Winterbottom* v. *Lord Derby*, 36 L. J. Ex. 194; *Cardiff Corporation* v. *Cardiff Waterworks*, 4 De G. & J. 596; 124 R. R. 400; *Wallasey Local Board* v. *Gracey*, 36 C. D. 593; 56 L. J. Ch. 739; *London Association of Shipowners* v. *London and India Docks Committee*, (1892) 3 Ch. p. 270; 62 L. J. Ch. p. 311; *Tottenham Urban Council* v. *Williamson*, (1896) 2 Q. B. 355; 65 L. J. Q. B. 592; *Boyce* v. *Paddington Borough Council*, (1903) 1 Ch. 110; 72 L. J. Ch. 28; *Sherringham United District Council* v. *Holsey*, (1904) 20 T. L. R. 402; *Wednesbury Corporation* v. *Lodge Holes Colliery Co.*, (1907) 1 K. B. p. 90; 76 L. J. K. B. p. 73 (reversed on other grounds, (1908) A. C. 325; 77 L. J. K. B. 847); *Att.-Gen.* v. *Garner*, (1907) 2 K. B. 487; 76 L. J. K. B. 965; *Marriott* v. *East Grinstead Gas Co.*, (1909) 1 Ch. p. 78; 78 L. J. Ch. p. 143; *Foley's Charity Trustees* v. *Dudley Corporation*, (1910) 1 K. B. p. 322; 79 L. J. K. B. p. 413; *Campbell* v. *Paddington Corporation*, (1911) 1 K. B. 869, 874; 80 L. J. K. B. 743; and see *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 495; 27 T. L. R. 581.

(*i*) *Marriott* v. *East Grinstead Gas Co.*, (1909) 1 Ch. 70; 78 L. J. Ch. 141.

(*j*) *Mayor of Devonport* v. *Plymouth Tramways Co.*, 52 L. T. 161.

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an action for an injunction without adducing evidence of actual injury to the public (*k*).

Trespass by Crown.

An officer of the Crown may be restrained from committing a trespass purported to be done in pursuance of an Act of Parliament, but, in fact, outside the statutory authority (*l*). An action for trespass committed or intended is not maintainable against the Crown, or against any officials of the Crown or Government sued in their official capacity or as an official body. Officers of State are liable as ordinary individuals for trespasses which they have personally committed or authorised (*m*).

Trespass by public companies or public bodies.

The principles upon which the Court acts in restraining trespass on the part of companies or bodies having compulsory powers to take or enter upon or interfere with lands, differ in some respects from those upon which it acts in restraining trespass by individuals. A private person who applies for an injunction to restrain a public company or body from entering illegally on or interfering with his land is not required to make out a case of destructive trespass or irreparable damage (*n*). The inability of private persons to contend with these powerful bodies raises an equity for the prompt interference of the Court to keep them from deviating from the terms prescribed by the statute which gives them authority. If they enter upon or interfere with a man's land without taking the steps required by the statute, the Court will at once interfere. A man has a right to say that they shall not affect or interfere with his land by stirring one step out of the exact limits prescribed by the statute. The principle upon

(*k*) *Att.-Gen.* v. *Shrewsbury Bridge Co.*, 21 C. D. 752; 51 L. J. Ch. 746; *London Association of Shipowners* v. *London and India Docks Committee*, (1892) 3 Ch. p. 270; 62 L. J. Ch. p. 311; *Att.-Gen.* v. *London and North Western Railway*, (1899) 1 Q. B. 72; 69 L. J. Q. B. 26; *Att.-Gen.* v. *Barker*, (1900) 83 L. T. 245.

(*l*) *Nireaki Tamaki* v. *Baker*, (1901) A. C. 561, 576; 70 L. J. P. C. 66.

(*m*) *Raleigh* v. *Goschen*, (1898) 1 Ch. 73, 78, 79; 67 L. J. Ch. 39; *Bainbridge* v. *Postmaster-General*, (1906) 1 K. B. 178, 192; 75 L. J. K. B. 366; see *Pridgeon* v. *Mellor*, (1913) 28 T. L. R. 261 (Treasury solicitor).

(*n*) *Liverpool Corporation* v. *Chorley Waterworks Co.*, 2 De G. M. & G. 852, 860; *Cardiff Corporation* v. *Cardiff Waterworks Co.*, 4 De G. & J. 596; *Marriott* v. *East Grinstead Gas and Water Co.*, (1909) 1 Ch. 70; 78 L. J. Ch. 141.

which the Court grants relief in such cases is not so much the nature of the trespass as the necessity of keeping such bodies within control (*o*). It is incumbent upon such bodies to prove clearly and distinctly from the statute the existence of the power which they claim a right to exercise. If there is any doubt with regard to the extent of the power claimed by them, that doubt must be for the benefit of the landowner, and should not be solved in a manner to give to the company any power that is not clearly and expressly defined in the statute (*p*). A company authorised by the legislature to take land compulsorily for a definite object, will, if attempting to take it for any other object be restrained by the Court (*q*). Public bodies invested with statutory powers must take care to keep within the limits of the authority committed to them, and in carrying out their powers, must act in good faith and reasonably and with some regard to the interest of those who may suffer for the good of the community (*r*). The Court has not only jurisdiction to interfere to restrain a company from affecting a man's land by stirring out of the exact limits prescribed by the statute which gives them authority, but will, as a matter of course, interfere (*s*), unless no injury has arisen or is likely

(*o*) *Kemp* v. *London and Brighton Railway Co.*, 1 Ra. Ca. 495, 504; *Frewin* v. *Lewis*, 4 M. & C. 249, 254; 48 R. R. 88; *Pinchin* v. *London and Blackwall Railway Co.*, 5 De G. M. & G., p. 860; 24 L. J. Ch. 417; 104 R. R. 810; *Sutton* v. *Mayor of Norwich*, 27 L. J. Ch., pp. 741, 742; *Rayner* v. *Stepney Corporation*, (1911) 2 Ch. 312; 80 L. J. Ch. 678. Where a local authority was restrained from enforcing a closing order under the Housing, etc., Act, 1909, the order not containing the statutory note informing the landowner of his right of appeal to the Local Government Board.

(*p*) *Simpson* v. *South Staffordshire Railway Co.*, 34 L. J. Ch. 380, 387; 4 De G. J. & S. 686; *Lamb* v. *North London Railway Co.*, L. R. 4 Ch. 522; 17 W. R. 746.

(*q*) *Galloway* v. *London Corporation*, L. R. 1 H. L., 34, 43; 35 L. J. Ch. 477; *London and North Western Railway Co.* v. *Westminster Corporation*, (1904) 1 Ch. p. 770; 73 L. J. Ch. p. 390 (reversed on other grounds, (1905) A. C. 426; 74 L. J. Ch. 631). And see *Att.-Gen.* v. *Frimley and Farnborough Water Co.*, (1908) 1 Ch. 727; 77 L. J. Ch. 442.

(*r*) *Westminster Corporation* v. *London and North-Western Railway Co.* (1905) A. C. 430, 433; 74 L. J. Ch. 629, 633.

(*s*) See *River Dun Navigation Co.* v. *North Midland Railway Co.*, 1 Ra. Ca. p. 154; *Att.-Gen.* v. *Mid-Kent, etc., Railway Co.*, 3 Ch. 100, 104; *Att.-Gen.* v. *London and North*

to arise, or unless the injury, if any has arisen, is so small as to be hardly capable of being appreciated by damages (*t*), or unless the remedy by damages is adequate and sufficient, or is, under the circumstances of the case, the proper remedy (*u*), or unless the trespass is one merely of a temporary nature (*v*). In a case where a company acting *bonâ fide* had taken possession of property by mistake, and the question at issue between the company and the landowner was only a question of value, the Court would not interfere, there being no evidence to show any culpable negligence on the part of the company (*w*). Lord Romilly, M.R., thought himself justified in taking into consideration in such a case the inconvenience which the public would be exposed to from granting the injunction (*x*). So, also, where a corporation in executing works under statutory powers inadvertently trespassed on the plaintiff's land, the Court awarded damages as the injury to the plaintiff was small while the removal of the works would have cost a considerable sum (*y*). The Court will not restrain the completion of works authorised by statute simply because the company has

Western Railway Co., (1900) 1 Q. B. 78, 69 L. J. Q. B. 29, and *Saunby* v. *London (Ont.) Water Commissioners*, (1906); A. C. 110, 115; 75 L. J. P. C. 27; *Westminster Corporation* v. *London and North Western Railway Co.*, (1905) A. C. 426; 74 L. J. Ch. 629; *Marriott* v. *East Grinstead Gas Co.*, (1909) 1 Ch. 70; 78 L. J. Ch. 141; *Piggott* v. *Middlesex County Council*, (1909) 1 Ch. 143, 144; 77 L. J. Ch. 813.

(*t*) *Warden of Dover Harbour* v. *South Eastern Railway Co.*, 9 Ha. p. 493; 21 L. J. Ch. 886; *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 212, 229; 28 L. J. Ch. 153; 121 R. R. 80; *Wandsworth Board of Works* v. *London and South Western Railway Co.*, 31 L. J. Ch. 854; *Dowling* v. *Pontypool, etc., Railway Co.*, 18 Eq. 714; 43 L. J. Ch. 761 But see *Goodson* v. *Richardson*, 9 Ch. 221; 43 L. J. Ch. 790; and *Marriott* v. *East Grinstead Gas Co.*, (1909) 1 Ch. 70; 78 L. J. Ch. 141.

(*u*) *Turner* v. *Blamire*, 1 Drew. 402; 22 L. J. Ch. 766; 94 R. R. 724.

(*v*) *Standish* v. *Mayor of Liverpool*, 1 Drew. 1; 94 R. R. 571. See 8 & 9 Vict. c. 20, ss. 32—42, as to the powers given to railway companies to take temporary possession of lands abutting on the intended railway for certain purposes.

(*w*) *Wood* v. *Charing Cross Railway Co.*, 33 Beav. 290; *Dowling* v. *Pontypool Caerleon, etc., Railway Co.*, 18 Eq. 714, 747; 43 L. J. Ch. 761.

(*x*) *Wood* v. *Charing Cross Railway Co.*, *supra*.

(*y*) *Riley* v. *Halifax Corporation*, (1907) 97 L. T. 278; 23 T. L. R. 613.

exceeded its powers, if the excess be abandoned and satisfaction be made for any injury caused, either by payment of money or by restoration in fact (*z*).

Injunction against a company continuing in possession.

If a company is in possession under a title acquired through the apparent owner of the property, the Court will not in general, at the suit of a person alleging an adverse title, interfere to restrain the company from continuing in possession (*a*), but if land has been taken by a company improperly, or if the conduct of the company has been vexatious, unreasonable, or oppressive, the Court may restrain them from continuing in possession until a proper compensation has been made (*b*).

In spite of the view expressed by Lord Eldon in *Agar's case* (*c*), it seems to be now established that a landowner cannot maintain a suit to restrain a company from exercising their compulsory powers over his land on the ground either of the resources of the company being insufficient for the completion of the undertaking, or of a material variation being made or intended to be made in the construction of the works; *unless* the plaintiff can prove to the satisfaction of the Court that he will suffer actual and material prejudice by the company's failure to complete the undertaking, or by the proposed variation, as the case may be (*d*).

Persons empowered by statute to take lands may take

Where persons are empowered by the legislature to take lands compulsorily for the purposes of an undertaking, they

(*z*) See *Westminster Corporation* v. *London and North Western Railway Co.*, (1905) A. C. at p. 440; 74 L. J. Ch. at p. 636.

(*a*) *Webster* v. *South Eastern Railway Co.*, 1 Sim. N. S. 272; 20 L. J. Ch. 194.

(*b*) *Berks* v. *Wycombe Railway Co.*, 3 Giff. 666, 673; *Lord Nelson* v. *Salisbury and Dorset Railway Co.*, 16 W. R. 1074; (1868) W. N. 189; *Stretton* v. *Great Western Railway Co.*, L. R. 5 Ch. 751.

(*c*) Coop. 77; 14 R. R. 217; cited 1 Sw. 250; and see *Blakemore* v. *Glamorganshire Railway Co.*, 1 My. & K. 154, 164; 2 L. J. (N. S.) Ch. 95; 36 R. R. 289.

(*d*) See *Holyoake* v. *Shrewsbury and Birmingham Railway Co.*, 5 Ra. Ca. 421; *Wintle* v. *Bristol and South Wales Union Railway Co.*, 10 W. R. 210; 125 R. R. 946; *Lee* v. *Milner*, 2 Y. & C. Ex. 611; 47 R. R. 463; *Salmon* v. *Randall*, 3 M. & C. 439, 445; 45 R. R. 306; *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 217, 228; 28 L. J. Ch. 153; 121 R. R. 80.

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what they shall deem necessary, so long as there is *bonâ fides*.

are the proper judges of what land they need (*e*). They may take as much land as they deem necessary for the proper construction of the works which they are authorised to make, and of the works incidental to the main purpose of the undertaking, provided they act *bonâ fide*; but they may be restrained from exercising those powers for any purpose of a collateral kind, that is, for any purposes except those for which the legislature has invested them with extraordinary powers (*f*). An injunction will, accordingly, be granted to restrain a company which has power to take land from taking the same for the purposes of another company which has not power to take the land (*g*). Although a company, having power to take land, may not take it for the purpose of another company which has not power to take it, a company which has legally taken land may enter into an agreement with another company for the joint use of it. The arrangement between the companies does not vitiate the title which the company has acquired to the land (*h*). If there is evidence to show that a company is taking land which is not *bonâ fide* required for the proper purposes of the under-

(*e*) *Stockton and Darlington Railway Co.* v. *Brown*, 9 H. L. C. 256; *Lewis* v. *Weston-super-Mare Local Board*, 40 C. D. 55, 62; 58 L. J. Ch. 39; *London and North Western Railway Co.* v. *Westminster Corporation*, (1904) 1 Ch. 766; 73 L. J. Ch. p. 390 (reversed on other grounds in H. L.); (1905) A. C. 426, 433; 74 L. J. Ch. p. 631; and see *Rex* v. *Brighton Corporation*, (1907) 23 T. L. R. 442.

(*f*) *Webb* v. *Manchester and Leeds Railway Co.*, 4 M. & C. 116; 48 R. R. 28; *Stockton and Darlington Railway Co.* v. *Brown*, 9 H. L. C. 256; *Simpson* v. *South Staffordshire Waterworks Co.*, 4 De J. & S. 679, 689; 34 L. J. Ch. 380; *Galloway* v. *Mayor, etc., of London*, 1 L. R. H. L., 43; *Lewis* v. *Weston-super-Mare Local Board*, 40 C. D. 55, 62; 58 L. J. Ch. 39, 43; *James* v. *Lovel*, 35 W. R. 628; *Stroud* v. *Wandsworth District Board of Works*, (1894) 1 Q. B. 68; 63 L. J. M. C. 88; *Batson and Joyner* v. *London School Board*, (1903) 20 T. L. R. 23; *London and North Western Railway Co.* v. *Westminster Corporation*, (1904) 1 Ch. 772; 73 L. J. Ch. 390 (reversed on the facts, (1905) A. C. 426; 74 L. J. Ch. 629); *Bradshaw* v. *Bray U. D. C.*, (1907) 1 Ir. 158; *Rex* v. *Brighton Corporation*, (1907) 23 T. L. R. 441; *see Att.-Gen.* v. *Frimley and Farnborough Water Co.*, (1908) 1 Ch. 727; 77 L. J. Ch. 442.

(*g*) *Wood* v. *Epsom and Leatherhead Railway Co.*, 8 C. B. N. S. 731; 30 L. J. C. P. 82; 125 R. R. 863; *Vane* v. *Cockermouth and Darlington Railway Co.*, 13 W. R. 1015.

(*h*) *Wood* v. *Epsom and Leatherhead Railway Co.*, 8 C. B. N. S. 731; 30 L. J. C. P. 82; 125 R. R. 863.

taking, it is not enough that the engineer of the company may have made an affidavit that the land is or would be wanted for the purposes of the undertaking. The purposes must be specified so that the Court may judge whether the land is *bonâ fide* required (*i*). But the moment the Court is satisfied with the *bona fides* and honesty of the engineer, that is sufficient (*j*). The burden of proving want of *bona fides* rests upon the party opposing the purchase (*k*). If there is no ground to suspect *mala fides*, the Court will give credit to the testimony of the engineer as to the quantity of land required for the purposes of the undertaking, or as to what would be a proper execution of the works (*l*). If there is more than one way of making the works which the company is authorised to make, and if the company are acting *bonâ fide*, the company by their engineer are the sole judges of the way to be adopted (*m*). Whether land is necessary for the purposes of the undertaking is a question of fact for a jury (*n*). But everything which is reasonably required for the purpose of completing the undertaking which the company are authorised to make, such, for instance, as land for accommodation works, etc., is land required for the purposes of the undertaking (*o*).

Where the legislature has conceded powers to a company for a certain purpose (*e.g.*, the formation of a railway), such a company must not, in order to effect its objects, exceed the limits of its powers. But where an existing public body, such as the corporation of a city, is entrusted by the legislature with

(*i*) *Flower* v. *London, Brighton, and South Coast Railway Co.*, 2 Dr. & Sm. 330; 34 L. J. Ch. 540; *Kemp* v. *South Eastern Railway Co.*, 7 Ch. 364, 375; 41 L. J. Ch. 404; *Lewis* v. *Weston-super-Mare Local Board*, 40 C. D. 62, 63, 65; 58 L. J. Ch. 43.

(*j*) *Wilkinson* v. *Hull, etc., Railway and Dock Co.*, 20 C. D. 323; 51 L. J. Ch. 788; *Lewis* v. *Weston Local Board*, 40 C. D. p. 68; 58 L. J. Ch. 43.

(*k*) *Errington* v. *Metropolitan District Railway Co.*, 19 C. D. 559, 571; 51 L. J. Ch. 305.

(*l*) *Selby* v. *Colne Valley, etc., Railway Co.*, 10 W. R. 661; 125 R. R. 969.

(*m*) *Wilkinson* v. *Hull, etc., Railway and Dock Co.*, 20 C. D. 323; 51 L. J. Ch. 788; see *Rex* v. *Brighton Corporation* (1907), 23 T. L. R. 441; and see *Dumphy* v. *Montreal Light Co.* (1907) A. C. 454; 76 L. J. P. C. 71.

(*n*) *Doe* v. *North Staffordshire Railway Co.*, 16 Q. B. 526; 20 L. J. Q. B. 249; 83 R. R. 577.

(*o*) *Wilkinson* v. *Hull, etc., Railway and Dock Co.*, 20 C. D. 323; 51 L. J. Ch. 788.

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the duty of making public improvements, the powers thus entrusted to it will not be subject to a strict and restrictive construction (*p*).

Lands Clauses Act and Railways Clauses Act, 1845.

The Lands Clauses Consolidation Act (*q*) is usually incorporated with all Acts giving corporations power to take land. Where the company is a railway company, the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), as well as the Lands Clauses Act, is generally incorporated with the special Act in all cases where the special Act has been obtained since the enactment of the two general Acts. These Acts, however, do not interfere with private contracts. They were intended only to apply where the parties have omitted, or are unable to determine their rights by agreement, and will not be allowed to override or control the provisions of a deed deliberately executed for the purpose of determining the rights of parties and in which they are not referred to (*r*).

All companies incorporating these two Acts with their own special Act are bound to adhere strictly to the powers of taking land prescribed by these Acts, and to proceed only in the mode and with the formalities required by them. The attempt to take or enter upon lands otherwise than in accordance with the mode pointed out by these Acts, except in so far as they may be modified by the special Act incorporating the company, is a trespass, and will be restrained by injunction (*s*).

(*p*) *Galloway* v. *Mayor, etc., of London*, 1 L. R. H. L. 34; *North London Railway* v. *Metropolitan Board of Works*, 1 John. 405; 28 L. J. Ch. 909; 123 R. R. 166; *Rolls* v. *School Board of London*, 27 C. D. 639, 643; *Lewis* v. *Weston-super-Mare Local Board*, 40 C. D. 55, 62; 58 L. J. Ch. 39, 42; *Stroud* v. *Wandsworth District Board of Works*, (1894) 1 Q. B. p. 68; 63 L. J. M. C. 88, 91; and see *Hill* v. *Wallasey Local Board*, (1894) 1 Ch. 133; 63 L. J. Ch. 3; but see *Att.-Gen.* v. *L. C. C.*, (1901) 1 Ch. p. 788; (1902) A. C. 165.

(*q*) 8 & 9 Vict. c. 18.

(*r*) *Sanderson* v. *Cockermouth and Workington Railway Co.*, 19 L. J. Ch. 503; *Clarke* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 1 J. & H. 631.

(*s*) *Fooks* v. *Wilts, Somerset, and Weymouth Railway Co.*, 5 Ha. 199; *Stone* v. *Commercial Railway Co.*, 4 M. & C. 122; 48 R. R. 32; *Schwinge* v. *London and Blackwall Railway Co.*, 3 Sm. & G. 30; 24 L. J. Ch. 405; 107 R. R. 3; *Great Western Railway Co.* v. *Swindon Railway Co.*, 22 C. D. 677; 52 L. J. Ch. 306; 9 A. C. 737; 53 L. J. Ch.

By sect. 18 a company, before taking or entering upon lands which they are authorised to take, must serve upon the landowner or persons interested therein, or enabled by the Act to sell and convey the same, a notice to treat, specifying the land which they require (*t*). Notice to treat must be served on the tenants who have an interest in the land (*u*), every lessee and sub-lessee being entitled to a separate notice (*w*). But notice to treat need not be served upon tenants who hold on quarterly or other short tenancies, if the company acquires the reversion and gives notice to quit terminating before it enters upon the land (*x*). Notice to treat should be served upon mortgagees as well as upon the mortgagor (*y*). Where notice to treat was served only upon the mortgagor, and the corporation duly proceeded thereunder and entered into possession and then served the mortgagee with a notice to treat, it was held that the company were not precluded by having taken possession from exercising their statutory right to give notice to treat to the mortgagee, and the mortgagee's application for an injunction to restrain the corporation proceeding on their notice to treat was refused (*y*). If the lands are in the possession of a receiver, or of the committee of a lunatic appointed by the Court, the company should make a special application to the Court. If they proceed,

1075; *Batson and Joyner* v. *London School Board* (1903), 20 T. L. R. 23; *Piggott* v. *Middlesex County Council*, (1909) 1 Ch. p. 144; 77 L. J. Ch. 813.

(*t*) See *Martin* v. *London, Chatham and Dover Railway Co.*, 1 Ch. 501; 35 L. J. Ch. 795; *Stretton* v. *Great Western Railway Co.*, 5 Ch. 751; 40 L. J. Ch. 50; *Dowling* v. *Pontypool, etc., Railway Co.*, 18 Eq. 714; 43 L. J. Ch. 761; *Prothero* v. *Tottenham and Forest Gate Railway Co.*, (1891) 3 Ch. 278. The placing of a post under the powers of a local Act (which incorporated the Lands Clauses Consolidation Act, 1845), in the soil under the pavement for the purpose of working tramways was held not to be a taking of land so as to make sect. 18 apply: *Escott* v. *Mayor of Newport*, (1904) 2 K. B. 369; 73 L. J. K. B. 693.

(*u*) *Rogers* v. *Hull Dock Company*, 34 L. J. Ch. 165.

(*w*) *Abrahams* v. *Mayor, etc., London*, 6 Eq. 625; 37 L. J. Ch. 732.

(*x*) *Syer* v. *Metropolitan Board of Works*, 36 L. T. 277; *Ex parte Nadin*, 17 L. J. Ch. 421; *Reg.* v. *Poulter*, 20 Q. B. D. 132; 57 L. J. Q. B. 138; and see sect. 121.

(*y*) *Cooke* v. *London County Council*, (1911) 1 Ch. 609; 80 L. J. Ch. 425.

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without the sanction of the Court, to enforce their statutory powers, an injunction may be obtained to restrain them (*z*). Entry on a person's land which is not included in the notice to treat is a trespass, although a subsequent notice to treat be served in respect of such land (*a*).

The notice to treat should state accurately the quantity and situation of the land required (*b*). A plan is generally annexed to the notice to treat. If any mistake is made on the face of the plan the company will be unable to enter upon any land which may be omitted (*c*). Notice that land is wanted for the purposes of a railway is sufficient; and accordingly the notice need not state that the land is wanted for the purposes of a station (*d*). A company is not bound to comprise the whole of the land which they may require in the first notice, but may from time to time, until the compulsory powers expire, serve fresh notices to the same landowner for taking any additional land which may be requisite for the works (*e*).

Effect of notice to treat.

After notice to treat has been given neither party can get rid of the obligation. The relationship of vendor and purchaser is to a certain extent, and for certain purposes, created by giving the notice (*f*). The land to be taken is fixed, leaving only the price to be ascertained; the landowner can still sell his land subject to the notice to treat, but he cannot create any

(*z*) *Re Taylor*, 6 Ra. Ca. 741; 1 Mac. & G. 210; *Tink* v. *Rundle*, 10 Beav. 318; 76 R. R. 139; *Richards* v. *Richards*, John. 255; 123 R. R. 102.

(*a*) *Cardwell* v. *Midland Railway Co.*, (1903) 20 T. L. R. 364; (1904) 21 T. L. R. 22.

(*b*) *Stone* v. *Commercial Railway Co.*, 4 M. & C. 122; 48 R. R. 32.

(*c*) *Kemp* v. *London, Brighton, etc., Railway Co.*, 1 Ra. Ca. 495. See, however, as to the correction of mistakes in the plans and books of reference of a railway company, 8 & 9 Vict. c. 20, s. 7; *Kemp* v. *West End Railway Co.*, 1 K. & J. 689; 103 R. R. 321, and as to the importance of the plans being accurate: *Herron* v. *Rathmines Improvement Commissioners*, (1892) A. C. 498, 513.

(*d*) *Wood* v. *Epsom and Leatherhead Railway Co.*, 8 C. B. N. S. 731; 30 L. J. C. P. 82; 125 R. R. 863.

(*e*) *Stamps* v. *Birmingham and Stour Valley Railway Co.*, 2 Ph. 673; 17 L. J. Ch. 431; 78 R. R. 240; *Simpson* v. *Lancaster Railway Co.*, 15 Sim. 580; *Kemp* v. *South Eastern Railway Co.*, 7 Ch. 365; 41 L. J. Ch. 404; see 26 & 27 Vict. c. 92, s. 8.

(*f*) *Marquis of Salisbury* v. *Great Northern Railway Co.*, 17 Q. B. 840; 21 L. J. Q. B. 185; 85

interest therein to the prejudice of the company (*g*). The landowner to whom the notice is given (*h*), and the company giving the notice are equally bound (*i*). The notice cannot be recalled or varied without the consent of the landowner (*j*), "if he insists upon holding them to it; but it is otherwise if the landowner for any reason either chooses to allow them to withdraw the notice or admits that it is informal or bad in any way" (*k*). The landowner, however, cannot accept the company's notice as to part of the land, and treat them as bound by it, and repudiate the notice as to the rest of the land. If the landowner repudiates the notice to treat, it can be withdrawn altogether, and the company cannot be compelled to proceed with that part of the notice which is acceptable to the landowner (*l*). The company cannot set up that there are no funds to go on with the undertaking (*m*). But the Commissioners of Woods and Forests were held entitled to

R. R. 691; *Adams* v. *London and Blackwall Railway Co.*, 2 Mac. & G. 118; 19 L. J. Ch. 557; 86 R. R. 37; *Haynes* v. *Haynes*, 1 Dr. & Sm. 126, 450; 30 L. J. Ch. 578; *Tiverton and North Devon Railway Co.* v. *Loosemore*, 9 A. C. 488, 503; 53 L. J. Ch. 812; *Mercer* v. *Liverpool Railway Co.*, (1903) 1 K. B. 652, 661; 72 L. J. K. B. 132; (1904) A. C. 461; 73 L. J. K. B. 962; *Wild* v. *Woolwich Borough Council*, (1909) 2 Ch. 293, 294; 78 L. J. Ch. 639; (1910) 1 Ch. 35; 79 L. J. Ch. 130.

(*g*) *Sewell* v. *Harrow and Uxbridge Railway*, (1903) 19 T. L. R. 130; (1904) 20 T. L. R. 21; *Mercer* v. *Liverpool Railway Co.*, *supra*; *Dawson* v. *Great Northern and City Railway Co.*, (1905) 1 K. B. 268; 74 L. J. K. B. 194; *Zick* v. *London United Tramways Co.*, (1908) 1 K. B. 615; 77 L. J. K. B. 316; (1908) 2 K. B. 126; 77 L. J. K. B. 945.

(*h*) *Metropolitan Railway Co.* v. *Wodehouse*, 34 L. J. Ch. 297; *Bristol, etc., Railway Co.* v. *Somerset, etc., Railway Co.*, 22 W. R. 399.

(*i*) *Sparrow* v. *Oxford, Worcester and Wolverhampton Railway Co.*, 9 Ha. 436; 2 De G. M. & G. 94; 21 L. J. Ch. 731; 95 R. R. 21.

(*j*) *Tawney* v. *Lynn and Ely Railway Co.*, 16 L. J. Ch. 282; 73 R. R. 771.

(*k*) *Ashton Vale Iron Co.* v. *Bristol Corporation*, (1901) 1 Ch. p. 599; 70 L. J. Ch. 233, *per* Romer, L.J.

(*l*) *Haynes* v. *Haynes*, 1 Dr. & Sm. 450; 30 L. J. Ch. 578, 581; *Wild* v. *Woolwich Borough Council*, (1909) 2 Ch. p. 294; 78 L. J. Ch. 639; (1910) 1 Ch. 35; 79 L. J. Ch. 130.

(*m*) *Rex* v. *Hungerford Market Co.*, 4 B. & Ad. 327; 38 R. R. 253; *Birch* v. *Marylebone Vestry*, 17 W. R. 1014; *Reg.* v. *Commissioners of Woods and Forests*, 15 Q. B. 773; 19 L. J. Q. B. 497; 81 R. R. 794; *Steele* v. *Mayor of Liverpool*, 14 W. R. 311.

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recede from a notice to treat, on the ground of a deficiency of funds (*n*). Notice to treat will be considered as abandoned if there is great delay in proceeding under it (*o*). When the notice to treat is met by a counter notice, under the 92nd section of the Act, requiring the company to take the whole of the property, the company may recede from the notice and refuse to take any part (*p*), and the company may afterwards, if they wish, serve a fresh notice in respect of the same land, or any part thereof, and upon that being validly withdrawn may serve a third notice, and so on during the time limited by their special Act for the exercise of compulsory powers (*q*). Where a landowner has waived the service of notice, he cannot take an objection for want of it (*r*).

Easements.

Section 18 of the Act does not apply to easements (*s*). It is not necessary to serve the owner of a mere easement, as a way-leave over the property (*t*). Easements may, however, come within the Act when taken in connection with the special Act (*u*). Where an easement is interfered with the remedy

(*n*) *Reg.* v. *Commissioners of Woods and Forests*, 15 Q. B. 773; 19 L. J. Q. B. 497; 81 R. R. 794.

(*o*) *Hedges* v. *Metropolitan Railway Co.*, 28 Beav. 109; 126 R. R. 48. See *Richmond* v. *North London Railway Co.*, 3 Ch. 679; 37 L. J. Ch. 886; *Ystalyfera Iron Co.* v. *Neath and Brecon Railway Co.*, 17 Eq. 150; 43 L. J. Ch. 476; *Tiverton and North Devon Railway* v. *Loosemore*, 9 A. C. p. 489; 53 L. J. Ch. 820.

(*p*) *Reg.* v. *London and South Western Railway Co.*, 12 Q. B. 775; 17 L. J. Q. B. 326; *King* v. *Wycombe Railway Co.*, 28 Beav. 104; 29 L. J. Ch. 462; 126 R. R. 45; *Grierson* v. *Cheshire Lines Committee*, 19 Eq. 83; 44 L. J. Ch. 35; *Thompson* v. *Tottenham and Forest Gate Railway Co.*, 67 L. T. 416; *Wild* v. *Woolwich Borough Council* (1910), 1 Ch. 38; 79 L. J. Ch. 130.

(*q*) *Ashton Vale Iron Co., Ltd.* v. *Mayor, etc., of Bristol*, (1901) 1 Ch. 591; 70 L. J. Ch. 230; 49 W. R. 295.

(*r*) *Rex* v. *South Holland Drainage*, 8 A. & E. 429; 8 L. J. (N. S.) Q. B. 64; 47 R. R. 618; *Tower* v. *Eastern Counties Railway Co.*, 3 Ra. Ca. 374; *Lynch* v. *Commissioners of Sewers*, 32 C. D. 72; 55 L. J. Ch. 409.

(*s*) *Pinchin* v. *London and Blackwall Railway Co.*, 5 De G. M. & G. 862; 24 L. J. Ch. 417; 104 R. R. 810; *Re Barrow-in-Furness Corporation and Rawlinson's Contract*, (1903) 1 Ch. p. 350; 72 L. J. Ch. p. 239.

(*t*) *Thicknesse* v. *Lancashire Canal Co.*, 4 M. & W. 472; 8 L. J. (N. S.) Ex. 49; 51 R. R. 692.

(*u*) *Great Western Railway Co.* v. *Swindon, etc., Railway Co.*, 9 A. C. 810; 53 L. J. Ch. 1075; *Hill* v. *Midland Railway Co.*, 21 C. D. 143; 51 L. J. Ch. 774; and see *Farmer* v. *Waterloo and City Railway*, (1895) 1 Ch. 527; 64 L. J. Ch.

of the dominant owner is to apply for compensation under section 68 of the Act and not for an injunction or damages (*x*).

Contract constituted by notice to treat and fixing of price.

There has been much difference of opinion whether, after the service of notice to treat, the landowner and the company are brought within the ordinary jurisdiction of the Court as to the specific performance of contracts. After an elaborate review of all the authorities, Kindersley, V.-C., held that, though to a certain extent and for certain purposes the notice to treat places the parties in the relation of vendor and purchaser, and involves some of the consequences which flow from actual contract, it does not amount to a contract which a Court of Equity will enforce upon a bill for specific performance, even when filed by a landowner against the company, still less that it constitutes a contract by the landowner to sell his land (*y*). But a notice to treat, followed by the subsequent fixing by arbitration of the purchase and compensation money, does create an enforceable contract (*z*). The company are bound to take a conveyance from the landowner, and cannot claim to complete by merely paying the purchase money into Court and taking possession (*a*).

Section 84.

By sect. 84 the promoters of an undertaking are forbidden to take possession of lands until after payment of the

338; *Barrow-in-Furness Corporation and Rawlinson's Contract*, note (*s*) *supra*; *City and South London Railway* v. *St. Mary Woolnoth*, (1903) 2 K. B. p. 737; 72 L. J. K. B. 945; (1905) A. C. 1; 74 L. J. K. B. 147.

(*x*) *Clark* v. *School Board for London*, 9 Ch. 120; 43 L. J. Ch 421; *Wigram* v. *Fryer*, 36 C. D. 96; 56 L. J. Ch. 1098; *Kirby* v. *School Board for Harrogate*, (1896) 1 Ch. 442; 65 L. J. Ch. 376; *Long Eaton Recreation Ground Co.* v. *Midland Railway Co.*, (1902) 2 K. B. 582; 71 L. J. K. B. 837.

(*y*) *Adams* v. *London and Blackwall Railway Co.*, 2 Mac. & G. 118; 19 L. J. Ch. 557; 86 R. R. 37; *Haynes* v. *Haynes*, 30 L. J. Ch. 578; 1 Dr. & Sm. 426, 444; *Tiverton and North Devon Railway Co.* v. *Loosemore*, 9 A. C. 480, 515; *In re Cary-Elwes Contract*, (1906) 2 Ch. p. 149; 75 L. J. Ch. 574.

(*z*) *Mason* v. *Stokes Bay Pier and Railway Co.*, 32 L. J. Ch. 110; *Harding* v. *Metropolitan Railway Co.*, 7 Ch. 154; 41 L. J. Ch. 371; *Regent's Canal Co.* v. *Ware*, 23 Beav. 575; 26 L. J. Ch. 566; *Piggott* v. *Great Western Railway Co.*, 18 C. D. 146; 50 L. J. Ch. 679; *Re Cary-Elwes, Contract*, (1906) 2 Ch. 143, 148; 75 L. J. Ch. 571, 574; *Wild* v. *Woolwich Borough Council*, (1910) 1 Ch. pp. 41, 42; 79 L. J. Ch. p. 130.

(*a*) *Re Cary-Elwes Contract*, (1906) 2 Ch. 143; 75 L. J. Ch. 571.

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purchase monies in the mode prescribed in the Act, provided always that they may, upon a certain notice therein specified, enter upon lands for the purpose of surveying the ground or setting out the line. The making a tunnel under a highway, without disturbing the surface, is an entry upon land within the section (*b*). A company will be restrained by injunction from entering upon land until the monies awarded have been paid or deposited, as required by the section (*c*). When a company enter upon land for the purposes of making a survey without giving the notice required by the section, they may be restrained (*d*).

Section 85.

By sect. 85, where a company is desirous of taking possession before any agreement has been entered into, award made or verdict given, it is authorised to do so upon payment into the bank of the sum claimed by any party, who shall not consent, or such as shall be determined by a surveyor, appointed by two justices, to be the value of the property, and giving a bond with two sureties for payment of the purchase monies and compensation to be ascertained under the provisions of the Act. It is incumbent on those who seek to avail themselves of the provisions of the section to show clearly and satisfactorily that they have fulfilled its conditions and complied with its requisitions (*e*).

Where a landowner refuses to allow a company to enter upon land on which they are entitled to enter under sect. 85, but does not actually resist their entry, they are justified in entering peaceably without calling on the sheriff under sect. 91, to give possession (*f*).

(*b*) *Ramsden* v. *Manchester, etc., Railway Co.*, 1 Exch. 723, 5 Ra. Ca. 552; 74 R. R. 830; *Farmer* v. *Waterloo and City Railway Co.*, (1895) 1 Ch. 527; 64 L. J. Ch. 338.

(*c*) *Lee* v. *Milner*, 2 Y. & C. 617; 47 R. R. 463; *Birmingham and District Land Co.* v. *London and North Western Railway Co.*, 36 C. D. 650; 57 L. J. Ch. 121, affirmed, 40 C. D. 268.

(*d*) See *Fooks* v. *Wills, Somerset, and Weymouth Railway Co.*, 5 Ha. 199, 4 Ra. Ca. 210.

(*e*) *Barker* v. *North Staffordshire Railway Co.*, 2 De G. & S. 55, 5 Ra. Ca. 401; 79 R. R. 125; *Field* v. *Carnarvon and Llanberis Railway Co.*, 5 Eq. 190; 37 L. J. Ch. 176.

(*f*) *Loosemore* v. *Tiverton and North Devon Railway Co.*, 22 C. D. 41; 51 L. J. Ch. 570; 9 A. C. 480; 53 L. J. Ch. 812.

Section 85 applies only to lands taken, and not to lands injuriously affected by the works (*g*).

Section 85 does not apply to lands injuriously affected.

Possession should not be taken by a company until a settlement has been come to with all parties interested. The taking possession after a settlement with the persons in possession only is erroneous, and contrary to the provisions of the Act (*h*). In cases of the sort, the Court will usually, on the motion for an injunction, order it to stand over upon the terms of the company undertaking to lodge the money, and giving the usual bond under this section of the Act (*i*).

Possession taken on agreement with tenants only.

Persons who take lands which they are authorised to take, with the consent of owners or occupiers, cannot afterwards be treated as trespassers (*k*). Where a railway company had complied with the provisions of the section, and had entered and taken land within the prescribed period for exercising the compulsory powers, their continuance in possession after the prescribed period without having the compensation assessed and the land conveyed to them was held lawful (*l*).

Parties who have taken possession regularly cannot be treated as trespassers.

By sect. 92 it is enacted that "no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house, or other building, or manufactory, if such party be willing and able to sell and convey the whole thereof." Owners under disability may avail themselves

Section 92.

Company cannot insist upon taking part of a house.

(*g*) *Hutton* v. *London and South Western Railway Co.*, 7 Ha. 262; 18 L. J. Ch. 345; 82 R. R. 99; *Lister* v. *Lobley*, 7 A. & E. 124; 6 L. J. K. B. 200; *Macey* v. *Metropolitan Board of Works*, 33 L. J. Ch. 377.

(*h*) *Inge* v. *Birmingham, Wolverhampton and Stour Valley Railway Co.*, 3 De G. M. & G. 666; 98 R. R. 274; *Martin* v. *London, Chatham, and Dover Railway Co.*, 1 Ch. 501; 35 L. J. Ch. 800; but see as to settlement with the mortgagor, followed by notice to treat to the mortgagee, *Cooke* v. *London County Council*, (1911) 1 Ch. 604; 80 L. J. Ch. 425.

(*i*) *Alston* v. *Eastern Counties Railway Co.*, 1 Jur. N. S. 1009; *Carter* v. *Great Eastern Railway Co.*, 9 Jur. N. S. 618.

(*k*) *Doe* v. *North Staffordshire Railway Co.*, 16 Q. B. 526; 20 L. J. Q. B. 249; 83 R. R. 577; *Doe d. Hudson* v. *Leeds and Bradford Railway*, 16 Q. B. 796; 20 L. J. Q. B. 486; *Knapp* v. *London, Chatham, and Dover Railway Co.*, 2 H. & C. 212; 32 L. J. Ex. 236.

(*l*) *Doe* v. *North Staffordshire Railway Co.*, 16 Q. B. 526; 20 L. J. Q. B. 249; 83 R. R. 577; *Tiverton and North Devon Railway* v. *Loosemore*, 9 A. C. 495; 53 L. J. Ch. 812.

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of the provisions of the section (*m*). The section applies, although the landowner has only a leasehold interest (*n*), and holds the property in question under different demises (*o*); but the option of the lessee does not affect the owner of the fee (*p*). An owner who has been served with notice by a company to take part of his premises may, under the section, refuse to sell less than the whole thereof: but he cannot by reason of such notice require that the whole be taken. The company may, on his refusal to sell less than the whole, abandon their notice, and refuse to take any part (*q*). If the counter notice comprises any land which the company is not bound to take, the company may disregard it (*r*). The acceptance by the solicitor of a company of a counter notice to take land which the company cannot be compelled to take, is not binding on the company (*s*). The giving a counter notice under the section creates an equity against the landowner, whether the original notice be valid or not. In such a case the Court will not in general interfere by injunction, even where the company serves a new notice after its compulsory powers have expired; except upon terms putting the landowner to sell and convey the property which he has, by his counter notice, offered to sell (*t*).

"House."

The word "house" in the section means all that would pass under the grant of a house in a conveyance, and will include

(*m*) *St. Thomas's Hospital* v. *Charing Cross Railway Co.*, 1 J. & H. 400; 30 L. J. Ch. 395.

(*n*) *Pulling* v. *London, Chatham, and Dover Railway Co.*, 3 D. J. & S. 661; 33 L. J. Ch. 505.

(*o*) *Macgregor* v. *Metropolitan Railway Co.*, 14 L. T. 354; *Siegenberg* v. *Metropolitan District Railway*, 32 W. R. 554.

(*p*) 3 De G. J. & S. p. 667; 33 L. J. Ch. p. 505.

(*q*) *Reg.* v. *London and South Western Railway Co.*, 12 Q. B. 775; 17 L. J. Q. B. 326; 76 R. R. 427; *King* v. *Wycombe Railway Co.*, 28 Beav. 104; 29 L. J. Ch. 462; 126 R. R. 45; *Thompson* v. *Tottenham and Forestgate Railway Co.*, 67 L. T. 416; *Ashton Vale Iron Co.* v. *Mayor of Bristol*, (1901) 1 Ch. 591; 70 L. J. Ch. 230; *Wild* v. *Woolwich Borough Council*, (1910) 1 Ch. 35; 79 L. J. Ch. 125.

(*r*) *Loosemore* v. *Tiverton and North Devon Railway Co.*, 22 C. D. 35; 51 L. J. Ch. 570; 9 A. C. 507; 53 L. J. Ch. p. 826.

(*s*) *Treadwell* v. *London and South Western Railway Co.*, 54 L. J. Ch. 565; (1884) W. N. 233.

(*t*) *Pinchin* v. *London and Blackwall Railway Co.*, 5 De G. M. & G. 851, 865; 24 L. J. Ch. 417.

the curtilage and garden, and all that is necessary to the enjoyment of the house (*u*). A house is not the less a house because it is a public-house or an inn; nor is it the less a house because it comprises or is used for the purpose of a shop, or because it comprises or is used for the purpose of a workshop or storehouse (*x*). The word, however, includes only what is necessary for the convenient use and occupation of the house, and not also what is subsidiary to, or necessary for, the convenience of the occupant of the house (*y*).

"Manufactory."

What is a "manufactory" within the meaning of the section is in each case a question of fact. The word has been inserted in the section to provide for the case of a manufacture being carried on in premises where there is no house or buildings, but there is a manufactory in the sense of its being appropriate for the carrying on of what may be called a manufacture (*z*). A manufactory may be a house or a building, or may be something more; it may be more than one house or more than one building (*a*), or it may consist of neither house nor building, but only of land used for a purpose of manufacturing (*b*).

Section 114. Interest of mortgagees.

Under sect. 114, if a mortgagee is required to accept payment of his mortgage money at a time earlier than the time limited by the mortgage deed, he is entitled to compensation in respect of the loss to h[illegible]ed by him by reason of

(*u*) *Grosvenor* v. *Hampstead Junction Railway Co.*, 1 De G. & J. 446, 454; 26 L. J. Ch. 731; 118 R. R. 165; *St. Thomas's Hospital* v. *Charing Cross Railway Co.*, 1 J. & H. 400, 404; *King* v. *Wycombe Railway Co.*, 28 Beav. 104; 29 L. J. Ch. 462; 126 R. R. 45; *Salter* v. *Metropolitan Railway Co.*, 9 Eq. 432; 39 L. J. Ch. 567; *Barnes* v. *Southsea Railway Co.*, 27 C. D. 536; *Kerford* v. *Seacombe, Hoylake, etc., Railway Co.*, 57 L. J. Ch. 270; *Low* v. *Staines Reservoir Committee*, 16 T. L. R. 184. See *Regent's Canal and Docks Co.* v. *London County Council*, (1912) 1 Ch. 589, 590; 81 L. J. Ch., p. 381.

(*x*) *Richards* v. *Swansea Improve-*

ramways Co., 9 C. D. 432, [illegible] L.J.

[illegible] *Steele* v. *Midland Railway Co.*, 1 Ch. 275; *Allhusen* v. *Ealing and South Harrow Railway*, 78 L. T. 285.

(*z*) *Richards* v. *Swansea Improvement and Tramways Co.*, 9 C. D. pp. 434, 437.

(*a*) See *Brook* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, (1895) 2 Ch. 571; 64 L. J. Ch. 890.

(*b*) *Richards Swansea Improvement and Tramway Co.*, *supra*. As to meaning of "other building" in Sect. 92, see *Regent's Canal Co.* v. *London County Council*, (1912) 1 Ch. 583; 81 L. J. Ch. 377.

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his mortgage money being prematurely paid off. Where a company had taken possession without providing for such compensation an injunction was granted (*c*).

Sections 121 and 122.

Tenancy at will, and from year to year.

Where the occupier of lands is a tenant at will, or from year to year, his interest is to be assessed summarily before two magistrates, and upon payment of the amount he must deliver up possession (*d*). If any lessee, on being required to do so, does not produce his lease or grant, or give the best evidence thereof, he may be treated as a tenant from year to year, and be dealt with accordingly (*e*).

Where an application is made to justices under sect. 121 to determine the compensation to be paid to a person claiming to be interested as yearly tenant, the justices have no jurisdiction to inquire into the title of the claimant to his alleged interest; but they are bound to inquire whether the claimant has been required to give up possession before the expiration of his term or interest, as it is a condition precedent to the right to compensation that the claimant should have been so required (*f*).

Section 121 does not apply to a person who produces a lease which, though void at law, is equivalent in equity to a lease for a greater interest than a yearly tenancy (*g*).

Section 123. Term for compulsory purchase.

Unless otherwise provided for in the special Act, the powers for the compulsory purchase or taking of lands are not to be exercised after the expiration of three years from the passing of the special Act (*h*).

A railway company, after the completion of their railway, can, under their general statutory powers, purchase land

(*c*) *Ranken* v. *East and West India Dock Co.*, 12 Beav. 298; 19 L. J. Ch. 153; 85 R. R. 95.

(*d*) Section 121. See *Reg.* v. *Great Northern Railway Co.*, 2 Q. B. D. 151; 46 L. J. Q. B. 4; *Syer* v. *Metropolitan Board of Works*, 36 L. T. N. S. 277; (1876) W. N. 305; (1877) W. N. 41.

(*e*) Section 122.

(*f*) *Great Northern and City Railway Co.* v. *Tillett*, (1902) 1 K. B. 874; 71 L. J. K. B. 525.

(*g*) *Sweetman* v. *Metropolitan Railway Co.*, 1 H. & M. 543.

(*h*) Section 123. See *Sparrow* v. *Oxford, Worcester, and Wolverhampton Railway Co.*, 9 Ha. 444; 2 De G. M. & G. 994; 21 L. J. Ch. 731; 95 R. R. 21; *Seymour* v. *London and South Western Railway Co.*, 33 L. T. 380; *Goldsmith's Co.* v. *West Metropolitan Railway*, (1904) 1 K. B. 1; 72 L. J. K. B. 931.

within the limits of deviation of their deposited plans which is reasonably necessary for or incident to the maintenance of their line (*i*).

Notice served before expiration of prescribed period.

If the notice to take lands has been given within the period prescribed by the section, it is immaterial that the purchase has not been completed before the time limited by the section. The landowner or the company may take the proper steps to ascertain the price notwithstanding that the prescribed period has gone by (*k*). So, also, if a company give notice to take land and enter on the land after taking the steps required by sect. 85 before the expiration of the period prescribed for the exercise of the powers of compulsory purchase, they may continue to hold the land after the expiration of that period (*l*). Where there has been a lawful entry under sect. 85, the promoters of a company may use the land though the time for the exercise of the powers given by the Act has elapsed. There is nothing in the Lands Clauses Acts which engrafts on the absolute power of entry on giving security for the value of the land given by sect. 85, a qualification that possession must be taken not only within the time prescribed by the special Act, but also so long before its expiration that the works may be made on the land within the time named in the special Act (*m*). Where a company have before the expiration of the time prescribed by their Act, lawfully acquired the right to use the land for the purpose of making their railway, they can construct it under their common law powers notwithstanding the expiration of the period fixed by their Act (*n*).

(*i*) *Thompson* v. *Hickman*, (1907) 1 Ch. 550; 76 L. J. Ch. 254.

(*k*) *Reg.* v. *Birmingham and Oxford Junction Railway Co.*, 15 Q. B. 634; 19 L. J. Q. B. 253; 81 R. R. 716; *Ystalyfera Iron Co.* v. *Neath and Brecon Railway Co.*, 17 Eq. 149; 43 L. J. Ch. 476; and see *Tiverton and North Devon Railway Co.* v. *Loosemore*, 9 A. C., p. 493; 53 L. J. Ch., p. 818.

(*l*) *Dee* v. *North Staffordshire Railway Co.*, 16 Q. B. 526; 20 L. J. Q. B. 249; 83 R. R. 577; *Tiverton and North Devon Railway Co.* v. *Loosemore*, *supra*.

(*m*) *Tiverton and North Devon Railway Co.* v. *Loosemore*, 9 A. C. 480; 53 L. J. Ch. 812; *Midland Railway Co.* v. *Great Western Railway Co.*, (1908) 2 Ch. 459, 644; 77 L. J. Ch. 820; (1909) A. C. 445; 78 L. J. Ch. 686.

(*n*) *Midland Railway Co* v. *Great Western Railway Co.*, *supra*.

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A company which has given notice to treat within the prescribed period and has taken the steps required by sect. 85, may enter after the time for the exercise of compulsory powers has expired. "The power of entry is a power necessary for the completion of the purchase, but is not itself one of the powers of compulsory purchase (*o*).

Effect of delay.

Mere delay on the part of the promoters after service of notice to treat does not raise any equity, because the landowner has a remedy by *mandamus*, compelling the promoters to proceed (*p*). But if notice to treat be given by a company immediately before the expiration of their compulsory powers, and there is great delay in completing the purchase, and the conduct of the promoters is such as to lead the landowner into the belief that the undertaking has been abandoned, an injunction may be obtained to prevent the company proceeding with the purchase (*q*).

Section 124.
Lands omitted by mistake.

By sect. 124 provision is made for the purchase by promoters of companies of interests in lands, the purchase of which has been omitted by mistake (*r*).

8 & 9 Vict. c. 18, s. 128.
Superfluous lands.

By sect. 128 the right of pre-emption of superfluous lands, which have been taken by the promoters of an undertaking, is given in the first place to the person entitled to the land from which the same have been originally severed, and in the next place to the person whose lands immediately adjoin such superfluous lands. The right of pre-emption extends to lessees

(*o*) *Marquis of Salisbury* v. *Great Northern Railway Co.*, 17 Q. B. 840, 853; 21 L. J. Q. B. 185; 85 R. R. 691; *Tiverton and North Devon Railway Co.* v. *Loosemore*, 9 A. C. 480; 53 L. J. Ch. 812.

(*p*) *Reg.* v. *Birmingham and Oxford Junction Railway Co.*, 15 Q. B. 634; 19 L. J. Q. B. 453; *Pinchin* v. *London and Blackwall Railway Co.*, 5 De G. M. G. 864; 24 L. J. Ch. 417; 104 R. R. 810.

(*q*) *Hedges* v. *Metropolitan Railway Co.*, 28 Beav. 109; 126 R. R. 48. But see *Ystalyfera Iron Co.* v. *Neath and Brecon Railway Co.*, 17 Eq. 142; 43 L. J. Ch. 476; *Tiverton and North Devon Railway Co.* v. *Loosemore*, 9 A. C. 480; 53 L. J. Ch. 812.

(*r*) See *Marquis of Salisbury* v. *Great Northern Railway Co.*, 5 C. B. N. S. 174; 28 L. J. C. P. 40; *Jolly* v. *Wimbledon and Dorking Railway Co.*, 1 B. & S. 821; 31 L. J. Q. B. 95; 124 R. R. 759; *Stretton* v. *Great Western and Brentford Railway Co.*, 5 Ch. 751; 40 L. J. Ch. 50; *Cardwell* v. *Midland Railway Co.*, (1904) 21 T. L. R. 22.

for years of such adjoining lands; and an injunction will be granted to enforce the right (*s*).

Special Act authorising the construction of a railway.

Where the undertaking is a railway company, the special Act usually enacts that it shall be lawful for the promoters of the undertaking to make and maintain the railway and works in the line and upon the land delineated in the plans and described in the books of reference, and to enter upon and take, and use such of the said land as shall be necessary for such purpose.

Plans deposited in compliance with standing orders.

Plans deposited in compliance with the standing orders prior to the introduction of a bill into Parliament do not form any part of the Act, except in so far as they may have been incorporated within its provisions; nor can they be otherwise referred to for the construction of the Act (*t*). Adherence to the deposited plans is not required by the Act (*u*).

The plans are only binding to the extent of determining the datum line and the line of railway measured with reference to that datum line, but not with reference to the surface levels, unless the Act incorporates them within its provision (*x*). The particular works intended to be made need not appear on the deposited plan. It is enough that the land required shall be within the limits of deviation (*y*).

Railways Clauses Act, 1845.

Limits of deviation.

By the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), ss. 11—15, a railway company may deviate a hundred yards from the datum line. The expression "deviation" is to

(*s*) *Coventry* v. *London, Brighton, etc., Railway Co.*, 5 Eq. 104; 37 L. J. Ch. 90.

(*t*) *North British Railway Co.* v. *Todd*, 12 Cl. & Fin. 732; 69 R. R. 180; *Beardmer* v. *London and North Western Railway Co.*, 1 Mac. & G. 112; 1 H. & Tw. 161; 18 L. J. Ch. 432; 84 R. R. 27.

(*u*) *Bradshaw* v. *Bray Urban District Council*, (1906) 1 I. R. 570—574; (1907) 1 I. R. 152.

(*x*) *North British Railway Co.* v. *Todd*, 12 Cl. & Fin. 722; 69 R. R. 180; *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 212; 28 L. J. Ch. 153; 121 R. R. 80; *Att.-Gen.* v. *Great Eastern Railway Co.*, 7 Ch. 482; 41 L. J. Ch. 505; L. R. 6 H. L. 367; *Edinburgh, etc., Tramways Co.* v. *Black*, L. R. 2 H. L. Sc. 339.

(*y*) *Weld* v. *South Eastern Railway Co.*, 33 L. J. Ch. 142; 8 L. T. N. S. 13. See as to the rectification of mistakes in the plans and books of reference, 8 & 9 Vict. c. 20, s. 7; *Taylor* v. *Clemson*, 2 Q. B. 978; 11 Cl. & Fin. 610; 11 L. J. Ex. 447; 65 R. R. 273; *Kemp* v. *West End of London and Crystal Palace Railway Co.*, 1 K. & J. 681; 103 R. R. 321.

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be taken with reference to the line of railway only: that is, the line of railway actually laid down shall not deviate more than a hundred yards from the line delineated in the Parliamentary plans, the *medium filum* of each being the commencement and termination in measuring the hundred yards (*z*).

Deviation in respect of a tunnel or viaduct.

8 & 9 Vict c. 20, s. 13.

When a viaduct or tunnel was marked on the plans deposited as intended to be made, no deviation could, under the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), s. 13, be made except with the consent of the landowner. It was necessary that the work, if made, should be made accordingly (*a*). But

26 & 27 Vict. c. 92, s. 4.

under 26 & 27 Vict. c. 92, s. 4, a railway company in the construction of the line may deviate from the line or level of any arch, tunnel, or viaduct described on the deposited plans or sections, so as the deviation be made within the limits of deviation shown on the plans, and so as the nature of the work described be not altered; and may also, with the consent of the Board of Trade, substitute any engineering work not shown on the deposited plan or sections for an arch, tunnel, or viaduct, as shown thereon.

Notice of deviation must be given.

The promoters of a company must give notice of their intention to exercise their powers of deviation; and the owner of any lands prejudicially affected may apply to the Board of Trade to decide whether the proposed deviation is proper to be made (*b*).

(*z*) *Doe* v. *Bristol and Exeter Railway Co.*, 6 M. & W. 320; 9 L. J. (N. S.) Q. B. 232; 55 R. R. 632; *Doe* v. *North Staffordshire Railway Co.*, 16 Q. B. 526; 20 L. J. Q. B. 249; 83 R. R. 577; *Dowling* v. *Pontypool, etc., Railway Co.*, 18 Eq. 714; 43 L. J. Ch. 761. See *Finck* v. *London and South Western Railway Co.*, 44 C. D. 330; 59 L. J. Ch. 458; *Prothero* v. *Tottenham Railway Co.*, (1891) 3 Ch. 278; and see *Herron* v. *Rathmines Improvement Commissioners*, (1892) A. C. 498; *Cardiff Railway* v. *Taff Vale Railway*, (1905) 2 Ch. 289; 74 L. J. Ch. 490, and as to the importance of the deposited plans for the protection of owners, see *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 223; 28 L. J. Ch. 153; 121 R. R. 80; *Herron* v. *Rathmines Improvement Commissioners*, (1892) A. C. 498, 513; *Att.-Gen.* v. *Frimley and Farnborough District Water Co.*, (1908), 1 Ch. p. 732; 77 L. J. Ch. 445.

(*a*) *Little* v. *Newport and Hereford Railway Co.*, 12 C. B. 752; 22 L. J. C. P. 39; *Att.-Gen.* v. *Tewkesbury and Malvern Railway Co.*, 1 De G. J. & S. 423; 32 L. J. Ch. 482.

(*b*) 8 & 9 Vict. c. 20, s. 12. See

Landowners who wish to prevent the promoters of a railway company from using the powers of deviation reserved to them under 8 & 9 Viet. c. 20, ss. 11—15, should have appropriate clauses inserted in the special Act (*c*). If there be nothing in the special Act, or the matter in dispute having been referred to arbitration, there be nothing in the reference to arbitration, or in the award consequent thereon, to prevent them from doing so, a company may exercise the powers of deviation as they think best within those limits (*d*).

Party who seeks to restrain a company from deviation must show that he is injured.

A landowner is not entitled to an injunction to restrain a railway company from proceeding with their works, although they are deviating to a greater extent than is authorised by 8 & 9 Viet. c. 20, ss. 11—15, unless he can show that he is substantially injured by the deviation (*e*).

Land necessary for convenience may be taken, though beyond the limits of deviation.

Land which is necessary for the erection of stations and other conveniences for the proper working of the railway, or for the purpose of constructing the works authorised by 8 & 9 Viet. c. 20, s. 16, may be taken, though it is beyond the limits of deviation (*f*), provided such land be scheduled in the Act and included in the plans and books of reference (*g*).

Land may not be taken, except for the proper purposes of the Act, although within the limits of deviation.

On the other hand, a company may be restrained from taking land not required for the purpose of enabling its works

Pearce v. *Wycombe Railway Co.*, 1 Drew. 244; 17 Jur. 660, 94 R. R. 655.

(*c*) *Eton College* v. *Great Western Railway Co.*, 1 Ra. Ca. 200.

(*d*) *Wood* v. *North Staffordshire Railway Co.*, 1 Mac. & G. 278, 284; *Selby* v. *Colne Valley and Halstead Railway Co.*, 10 W. R. 661.

(*e*) *Holyoake* v. *Shrewsbury and Birmingham Railway Co.*, 5 Ra. Ca. 421, 427. See *Wintle* v. *Bristol and South Wales Union Railway Co.*, 10 W. R. 210; *Finck* v. *London and South Western Railway Co.*, 44 C. D. 330; 59 L. J. Ch. 458; and *Bradshaw* v. *Bray Urban Council*, (1907) 1 I. R. p. 157.

(*f*) *Cother* v. *Midland Railway Co.*, 2 Ph. 469; 17 L. J. Ch. 235; *Sadd* v. *Maldon, Braintree, and Witham Railway Co.*, 6 Exch. 143; 20 L. J. Ex. 102; 86 R. R. 199. See *Wood* v. *Epsom and Leatherhead Railway Co.*, 8 C. B. N. S. 731; 30 L. J. C. P. 83; 125 R. R. 863; and see *Lewis and Solome* v. *Charing Cross, Euston, etc., Railway*, (1906) 1 Ch. pp. 508, 515; 75 L. J. Ch. 282.

(*g*) *Doe* v. *North Staffordshire Railway Co.*, 16 Q. B. 526; 20 L. J. Q. B. 249; 83 R. R. 577; *Dowling* v. *Pontypool, etc., Railway Co.*, 18 Eq. 714; 43 L. J. Ch. 761; *Finck* v. *London and South Western Railway Co.*, 44 C. D. 330; 59 L. J. Ch. 458; and see *Protheroe* v. *Tottenham, etc., Railway Co.*, (1891) 3 Ch. 278.

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to be constructed in a proper and convenient manner, even although such land be within the limits of deviation. Thus a railway company was restrained from taking a piece of land for the purpose of making an embankment and a greater slope on each side of a cutting, and from claiming more land than was declared by a referee to be necessary for the purposes of the Act (*h*). So a railway company was restrained from taking land for the purpose of excavating materials therefrom to be used in completing an embankment, though it was within the limits of deviation (*i*). So, also, a railway company was restrained from taking land for the purpose of altering a road, so as to be convenience to a neighbouring proprietor, though the land lay within the limits of deviation (*k*); and where a railway company had served notice under sect. 32 of the Railways Clauses Act, 1845, with the intention of taking temporary possession of land and constructing a railroad thereon, an injunction was granted (*l*).

Company—when restrained from exercising powers of deviation.

The Court will not, it seems, on the ground of public inconvenience, restrain a railway company keeping within their powers of deviation, from deviating from the plan, unless it can be shown that they are acting capriciously (*m*).

8 & 9 Vict. c. 20, ss. 16 and 19.

By sects. 16 and 19 of the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), railway companies are empowered to execute certain works in the mode and in the manner therein mentioned (*n*). By sect. 16 it is declared that they shall in the execution of such works do as little damage as can

(*h*) *Webb* v. *Manchester and Leeds Railway Co.*, 4 M. & C. 116; 48 R. R. 28. See also *Simpson* v. *South Staffordshire Waterworks Co.*, 4 De G. J. & S. 679; 34 L. J. Ch. 380.

(*i*) *Eversfield* v. *Mid-Sussex Railway Co.*, 3 De G. & J. 286; 28 L. J. Ch. 107; 121 R. R. 123. See also *Bentinck* v. *Norfolk Estuary Co.*, 8 De G. M. & G. 714; 26 L. J. Ch. 404; 114 R. R. 297.

(*k*) *Dodd* v. *Salisbury and Yeovil Railway Co.*, 1 Giff. 158, 163; affirmed, 33 L. T. O. S. 311; 114 R. R. 389.

(*l*) *Morris* v. *Tottenham and Forest Gate Railway Co.*, (1892) 2 Ch. 47; 61 L. J. Ch. 215.

(*m*) *Att.-Gen.* v. *Great Western Railway Co.*, 14 W. R. 726.

(*n*) See *Rangeley* v. *Midland Railway Co.*, 3 Ch. 306; 37 L. J. Ch. 313; *Att.-Gen.* v. *Ely, etc., Railway Co.*, 4 Ch. 194; 38 L. J. Ch. 258; *Lewis* v. *Charing Cross, Euston and Hampstead Railway Co.*, (1906) 1 Ch. 503; 75 L. J. Ch. 282.

be (*o*). A railway company may erect buildings over streets in a town for the construction of stations, warehouses, etc., or may divert the course of a road or river, if it is necessary or reasonably convenient for the purposes of the line (*p*). But an act is not necessary within the meaning of the clause merely because it enables the company to execute their works more economically (*q*).

Roads.

Section 53 of 8 & 9 Vict. c. 20 provides that if the company find it necessary to interfere with any road, either public or private, so as to make it impossible for or dangerous or extraordinarily inconvenient to passengers or carriages, or to the persons entitled to the use thereof, they are first to provide a sufficient road in substitution for it (*r*). This section applies to a permanent diversion, as well as to a temporary diversion of a road (*s*).

8 & 9 Vict. c. 20, s. 76. Sidings to railways.

By 8 & 9 Vict. c. 20, s. 76, the owners or occupiers of lands adjoining a railway are empowered to lay down branches communicating with the railway, and the railway company is required to make openings in the line or sidings for the branches at places to be approved by the company (*t*), and by a recent Act are required to give reasonable facilities for

(*o*) See *Westminster Corporation* v. *London and North Western Railway Co.*, (1905) A. C., p. 433; 74 L. J. Ch., p. 633.

(*p*) *Att.-Gen.* v. *Eastern Counties Railway Co.*, 2 Ra. Ca. 823; *Pugh* v. *Golden Valley Railway Co.*, 15 C. D. 330; 49 L. J. Ch. 721.

(*q*) *Fenwick* v. *East London Railway Co.*, 20 Eq. 544; 44 L. J. Ch. 602; *Pugh* v. *Golden Valley Railway Co.*, 15 C. D. 330; 49 L. J. Ch. 721; *Morris* v. *Tottenham and Forest Gate Railway Co.*, (1892) 2 Ch. 47; 61 L. J. Ch. 215; *Att.-Gen.* v. *Metropolitan Railway Co.*, (1894) 1 Q. B. 384, 390; 69 L. T. 811; *Emsley* v. *North Eastern Railway Co*, (1896) 1 Ch., p. 434; 65 L. J. Ch., p. 385. But see *Harrison* v. *Southwark and Vauxhall Water Co.*, (1891) 2 Ch. 409; 60 L. J. Ch. 630.

(*r*) See *Kemp* v. *London and Brighton Railway Co.*, 1 Ra. Ca. 505; *Att.-Gen.* v. *Great Northern Railway Co.*, 4 De G. & S. 75; 87 R. R. 294; *Att.-Gen.* v. *London and South Western Railway Co.*, 3 De G. & S. 439; *Att.-Gen.* v. *Barry Docks Railway Co.*, 35 C. D. 575; 56 L. J. Ch. 1018. A road already existing is not a substituted road within the meaning of the clause; *Att.-Gen.* v. *Great Northern Railway Co.*, 4 De G. & S. 75; 87 R. R. 294.

(*s*) *Att.-Gen.* v. *Barry Docks, etc., Co.*, 35 C. D. 573; 56 L. J. Ch. 1018.

(*t*) See *Woodruff* v. *Brecon and Merthyr Railway Co.*, 28 C. D. 190; 54 L. J. Ch. 620.

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the junction of private sidings or private branch lines with the company's railways (*u*).

Powers of passing over line.

By 8 & 9 Vict. c. 20, s. 87 (*x*), railway companies are empowered to enter into contracts with other railway companies for passing over each other's lines upon the payment of such tolls and under such restrictions as may be mutually agreed upon, and to enter into a contract for the division or apportionment of the tolls with the view of carrying out this object. The section does not authorise an agreement which will amount in fact to a lease, or to a transfer of the undertaking to another company (*y*), or which will have the effect of enabling one company to carry the whole of the traffic of another company, under colour of passing over the line of the other company (*z*); but merely gives to one party a limited power to run a portion of its traffic over the other line (*a*).

An agreement between two railway companies, giving one company the power to pass over the line of the other on certain specified terms, confers rights of a permanent nature, and is not a mere licence determinable at will. The terms of the agreement are not too vague, but will be held to concede a user consistent with the proper enjoyment of the railway, the subject-matter of the contract, and with the rights of the granting party (*b*).

8 & 9 Vict. c. 20, s. 92.

Where a railway company refused to allow the plaintiffs to run engines and carriages over part of their line under the powers of sect. 92, the Court would not, at the suit of the plaintiffs, restrain the company from preventing the exercise of the right. The ground of the decision was that inasmuch

(*u*) Railways (Private Sidings) Act, 1904 (4 Edw. 7, c. 19). See *Greenwood* v. *Cheshire Lines Committee*, (1909) 13 Ra. Ca. 169.

(*x*) Amended by 26 & 27 Vict. c. 92, ss. 22—29.

(*y*) *Great Northern Railway Co.* v. *Eastern Counties Railway Co.*, 9 Ha. 306; 21 L. J. Ch. 837; 89 R. R. 456; cf. *Midland Railway Co.* v. *Great Western Railway Co.*, 8 Ch. 841; 42 L. J. Ch. 428.

(*z*) *Simpson* v. *Denison*, 10 Ha. 51; 90 R. R. 276; cf. *Midland Railway Co.* v. *Great Western Railway Co.*, 8 Ch. 841; 42 L. J. Ch. 438.

(*a*) *Winch* v. *Birkenhead Railway Co.*, 5 De. G. & S. 562; 90 R. R. 145; *Simpson* v. *Denison*, 10 Ha. 51; 90 R. R. 276.

(*b*) *Llanelly Railway, etc., Co.* v. *London and North Western Railway Co.*, 45 L. J. Ch. 539; L. R. 7 H. L. 550.

as the plaintiffs could not run over the lines unless the points and signals on the line were properly worked by the railway company, the Court could not grant relief, as it does not order the performance of a continuous act like working signals, the doing of which requires continuous attention, and cannot be seen to by the Court (*c*).

Junctions.

Where a railway company is empowered by its Act to form a junction with another line of railway, the latter company will be restrained from interfering with the former company in making the junction (*d*). But in making the junction a company may not take the land or interfere with the works of the company or person to whom the other railway belongs, or any of the works thereof, further than is necessary for making the junction (*e*).

Injunction to restrain smoke nuisance.

The fact that a particular penalty is imposed by statute (*f*) in the event of engines employed on a railway being so constructed as not to consume their own smoke, does not, it seems, preclude a person from applying for an injunction to restrain the nuisance (*g*).

Carriages and engines to be brought on railway.

The Court will enforce by injunction the provisions of the 115th section of the Railways Clauses Consolidation Act, that no engine or other description of moving power shall be brought or used upon a railway, unless the same shall have been approved by the railway company as therein mentioned, notwithstanding that to enforce such right of inspection would occasion great inconvenience to the public traffic (*h*).

(*c*) *Powell Duffryn Steam Coal Co.* v. *Taff Vale Railway Co.*, 9 Ch. 331; 43 L. J. Ch. 575; and see *Ryan* v. *Mutual Tontine Westminster Chambers Association*, (1893) 1 Ch. 116, 128; 62 L. J. Ch. 252, 256; *Great Central Railway Co.* v. *Midland Railway Co.* (1912) 1 Ch. p. 217; 81 L. J. Ch. p. 127.

(*d*) *Great Northern Railway Co.* v. *East and West India Docks, etc., Railway Co.*, 7 Ha. Ca. 356.

(*e*) 26 & 27 Vict. c. 92, s. 11; and see 59 & 60 Vict. c. 48, s. 23.

(*f*) 8 & 9 Vict. c 20, ss. 114, 145; and s. 19 of 31 & 32 Vict. c. 119. See *London County Council* v. *Great Eastern Railway Co.*, (1906) 2 K. B. 312; 75 L. J. K. B. 490.

(*g*) *Smith* v. *Midland Railway, etc., Co.*, 25 W. R. 861; (1877) W. N. 200. See also *Andrews* v. *Great Eastern Railway Co.*, (1866) 2 T. L. R. 664; *Cull and Rooke* v. *Great Eastern Railway Co.*, (1900) 64 J. P. 216, and *ante*, pp. 8 and 9.

(*h*) *Midland Railway Co.* v. *Ambergate, Nottingham, etc., Railway Co.*, 10 Ha. 359; 90 R. R. 398.

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8 & 9 Vict. c. 20. s. 117.

The Court will also enforce by injunction the provisions of the 117th section of the Railways Clauses Consolidation Act, that no carriage belonging to another company having the right to run over the line, shall pass along or be upon the railway unless it be at all times, so long as it shall be used or shall remain on the railway, of the construction and in the condition which the regulations of the company for the time being shall require (*i*).

Clause prohibiting a company from taking land without consent.

Where the special Act prohibits a company from entering upon or taking lands without the consent of the owner, his consent must be obtained before the lands are taken. A rival company may, under the provisions of the clause, refuse to allow their railway to be crossed, although the effect may be to prevent the undertaking from being carried into execution (*k*).

Owner's rights after possession taken by company.

After a company have taken lands under their compulsory powers and paid the money, the owner of the land cannot restrain them in the mode of using the land for the purposes of the company (*l*). Nor can a man who has sold his land to a company and given them possession, have an *interlocutory* injunction to restrain the company from continuing in possession of the land in default of payment of the purchase money. His proper remedy is to enforce his lien or to have a receiver appointed (*m*). But a vendor of land to a railway company is entitled to the same lien on the land for the unpaid purchase money, and the same remedies for enforcing it, as an ordinary vendor (*n*). Where, therefore, the unpaid vendor of land taken by a railway company *has recovered judgment* in an action against the company to enforce his lien, the Court will on default in payment of the purchase money, there being

(*i*) See *Rhymney Railway Co.* v. *Taff Vale Railway Co.*, 29 Beav. 153, 160; 30 L. J. Ch. 482.

(*k*) *Clarence Railway Co.* v. *Great North of England, etc., Railway Co.*, 4 Q. B. 46; *Gray* v. *Liverpool and Bury Railway Co.*, 9 Beav. 391.

(*l*) *East and West India Docks, etc., Railway Co.* v. *Dawes*, 11 Ha. 363.

(*m*) *Pell* v. *Northampton, etc., Railway Co.*, 2 Ch. 100; 36 L. J. Ch. 319; *Munns* v. *Isle of Wight Railway Co.*, 5 Ch. 418; 39 L. J. Ch. 522; *Latimer* v. *Aylesbury, etc., Railway Co.*, 9 C. D. 385.

(*n*) *Wing* v. *Tottenham, etc., Railway Co.*, 3 Ch. 740; 37 L. J. Ch. 654.

evidence that the land is unsaleable, grant an injunction to restrain the company from running trains over the railway and continuing in possession of the land (*o*).

Where a railway company had paid part of the purchase money and had taken possession, but retained the balance until a good title could be shown, the Court held that they had purchased the right of possession and would not restrain the company from continuing in possession of the land until payment of the balance into Court (*p*).

Apart from any facilities granted by the Railway Commissioners, a railway company have the right of excluding from their stations all persons except those using or desirous of using the railway, and may impose upon the rest of the public any terms they think proper as the condition of admittance. Accordingly, a railway company having a hotel of their own within the limits of the station may qualify their permission to other hotel proprietors and their servants to have free access to the platform by the condition that such servants when attending at the platform shall not wear a distinctive badge or livery (*q*).

The Commissioners of Sewers have power under Michael Angelo Taylor's Act (*r*) for the purpose of widening, altering, and improving streets and public places in the Metropolis, to take houses and lands or any part thereof which shall be adjudged by them to be necessary for carrying out the purposes of the section. They have no power to take houses or lands simply for the purpose of altering the levels, and in order to take lands for the purpose of widening or altering a street there must be a *bonâ fide* belief that the widening or altering of the street is wanted for the improvement of the

57 Geo. III. c. xxix., s. 80.

(*o*) *Allgood* v. *Merrybent, etc., Railway Co.*, 33 C. D. 571; 55 L. J. Ch. 743.

(*p*) *Capps* v. *Norwich and Spalding Railway Co.*, 9 Jur. N. S. 635.

(*q*) *Perth General Station Committee* v. *Ross*, (1897) A. C. 479; 66 L. J. P. C. 81.

(*r*) 57 Geo. III. c. xxix., s. 80. The powers, duties, and liabilities of the Commissioners of Sewers have been transferred to the Common Council of the City of London by 60 & 61 Vict. c. cxxxiii. See also sect. 90 of the Metropolis Management Act, 1855, and sect. 73 of the Metropolis Management Act, 1862, and sects. 6 and 213 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.).

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street within the meaning of the section. An adjudication by them that houses or lands are necessary for carrying out the purposes of the section must, in order to be final and conclusive, be an honest and *bonâ fide* adjudication. It must also be an adjudication which bears some relation to reason. If they come reasonably to the conclusion that the whole of a house or piece of land is required for enabling them to carry out improvements in respect of which they can take land compulsorily, their adjudication will be upheld. But they have no power to adjudicate that the possession of the whole of a house or piece of land is necessary for the purpose of improvements where they only intend to use a part of it for that purpose, though if they made such adjudication in the *bonâ fide* belief that they would require the whole for the improvements, the correctness of the adjudication could not be questioned (*s*).

Notice to treat.

A notice to treat under Michael Angelo's Act does not in substance differ from a notice to treat under the Lands Clauses Act; in either case the notice defines the land to be taken, and an owner must either treat the notice as good or repudiate it as a whole; he cannot accept it in part. If the owner repudiates it in part, the local authority are entitled to withdraw their notice altogether and need not make compensation for any expense incurred by the owner in consequence of the service of their notice to treat (*t*).

When an owner can retain part of his house.

Where a landowner desires to retain part of a house, the local authority will be restrained from acting on a notice to treat for the whole, unless the remaining part will be useless as a house (*u*). Whether the part which is left will be available

(*s*) *Gard* v. *Commissioners of Sewers*, 28 C. D. 486; 54 L. J. Ch. 698; *Lynch* v. *Commissioners of Sewers*, 32 C. D. 72; 55 L. J. Ch. 409; *Pescod* v. *Westminster Corporation*, (1905) 2 Ch. p. 487; 74 L. J. Ch. 668; *Denman* v. *Westminster Corporation*, (1906) 1 Ch. p. 476; 75 L. J. Ch. 272; *Davies* v. *City of London Corporation*, (1913) 1 Ch. p. 421; 82 L. J. Ch. p. 289.

(*t*) *Wild* v. *Woolwich Borough Council*, (1910) 1 Ch. 38; 79 L. J. Ch. 126.

(*u*) *Tenliere* v. *Vestry of St. Mary Abbotts*, 30 C. D. 642; 55 L. J. Ch. 23; *Denman* v. *Westminster Corporation*, (1906) 1 Ch. p. 478; 75 L. J. Ch. 272; see *Davies* v. *City of London Corporation*, (1913) 1 Ch. p. 424; 82 L. J. Ch. p. 290.

as a house or not, is a question of fact to be determined in each case, but the circumstance that the part left will require some reconstruction is not conclusive evidence that it will not be a house (*v*). On the other hand, a local authority will be restrained from proceeding with a notice to treat to take part of a house, where the removal of such part will substantially injure the enjoyment of the house in the manner in which it was formerly enjoyed (*x*).

When local authority restrained from taking part.

Section 149 of the Public Health Act, 1875, which vests certain streets in an urban authority does not vest in the local authority the soil below the surface of the street, or the air above the surface, beyond what is reasonably necessary for the control, protection, and maintenance of the street as a highway (*y*); and the law is the same in the case of streets vested in a local authority under sect. 96 of the Metropolis Management Act (*z*), and in the case of main roads vested in a county council by sect. 11 of the Local Government Act, 1888 (*a*), and in the case of roads constructed by the Road Board under 9 Edw. 7, c. 47 (*b*). Accordingly, where an urban authority was empowered by Act to erect on land belonging to them, or under their control, lavatories for the

Vesting of streets in local authority.

(*v*) *Denman* v. *Westminster Corporation*, (1906) 1 Ch. 464; 75 L. J. Ch. 272; *Davies* v. *City of London Corporation*, (1913) 1 Ch. 425; 82 L. J. Ch. p. 290.

(*x*) *Gordon* v. *Vestry of St. Mary Abbots*, (1894) 2 Q. B. 742; 63 L. J. M. C. 193; *Aldis* v. *London Corporation*, (1899) 2 Ch. 169; 68 L. J. Ch. 576; *Gibbon* v. *Paddington Vestry*, (1900) 2 Ch. 794; 69 L. J. Ch. 746; *Pescod* v. *Westminster Corporation*, (1905) 2 Ch. p. 488; 74 L. J. Ch. p. 628; *Thompson* v. *Hammersmith Corporation*, (1906) 1 Ch. 299; 75 L. J. Ch. 129; *Denman* v. *Westminster Corporation*, *supra*; *Green* v. *Hackney Corporation*, (1910) 2 Ch. 105; 80 L. J. Ch. 16; *Davies* v. *City of London Corporation*, (1913) 1 Ch. 415; 82 L. J. Ch. 286.

(*y*) *Mayor of Tunbridge Wells* v. *Baird*, (1896) A. C. 434; 65 L. J. Q. B. 451; *Wandsworth Board of Works* v. *United Telephone Co.*, 13 Q. B. D. 904; 53 L. J. Q. B. 449; *Finchley Electric Light Co.* v. *Finchley Urban Council*, (1903) 1 Ch. 437; 72 L. J. Ch. 297; *Foley's Charity Trustees* v. *Dudley Corporation*, (1910) 1 K. B. 322, 324; 79 L. J. K. B. 410; and see *Andrews* v. *Abertillery Urban Council*, (1911) 2 Ch. 406, 407; 80 L. J. Ch. 724.

(*z*) *St. Mary's Vestry, Battersea* v. *County of London and Brush Electric Lighting Co.*, (1899) 1 Ch. 474; 68 L. J. Ch. 238.

(*a*) See *Att.-Gen.* v. *Barker*, (1900) 83 L. T. 245.

(*b*) See sect. 9 (1).

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use of the public, it was held that the local authority had no power to excavate the soil and erect lavatories below the surface of the street (*c*). So, also, a Metropolitan Board of Works was held not to be entitled to maintain an action for an injunction against the erection of a telephone wire across a street under their control, as the wire was erected at a great height and caused no appreciable danger to the public or to the traffic in the street (*d*). So, also, an Urban District Council was held not to be entitled to prevent electric wires being carried over a street at a height above the area required for the user of the street (*e*). So, also, where an electric lighting company had illegally broken up the surface of a street within the district of a vestry in the Metropolis and placed their pipes and wires at a depth of about two feet below the surface, it was held that the vestry could not maintain an action for an injunction to compel the company to remove their pipes and wires (*f*). So, also, a local authority was held not to be entitled to an injunction to restrain a company from making a tunnel under a road which did not interfere with the use of the road (*g*).

Where a local authority, having statutory powers to erect pillars in or under their streets for the purpose of working their tramways, erected a pillar in the pavement and sunk it in the plaintiff's subsoil beneath to a depth of six feet, it was held that the local authority's act was not a trespass,

(*c*) *Mayor of Tunbridge Wells* v. *Baird*, (1896) A. C. 434; 65 L. J. Q. B. 451. See now sects. 2 (2) and 47 of the Public Health Amendment Act, 1907, and sect. 44 of the Public Health (London) Act, 1891; and *Westminster Corporation* v. *London and North Western Railway Co.*, (1905) A. C. 426; 74 L. J. Ch. 629.

(*d*) *Wandsworth Board of Works* v. *United Telephone Co.*, 13 Q. B. D. [illegible]; 53 L. J. Q. B. 449. See the Electric Lighting Act, 1882, s. 14, and the Public Health Act, 1890, s. 13 (1); and see the London Overhead Wires Act, 1891, c. lxxvii.

(*e*) *Finchley Electric Light Co.* v. *Finchley Urban District Council*, (1903) 1 Ch. 437; 72 L. J. Ch. 297.

(*f*) *St. Mary's Vestry, Battersea* v. *County of London and Brush Electric Lighting Co.*, (1899) 1 Ch. 474; 68 L. J. Ch. 238. See the Electric Lighting Act, 1882, s. 12 (2), 13, and the Electric Lighting (Clauses) Act, 1899, ss. 11—20, Electric Lighting Act, 1909, s. 3, and *Andrews* v. *Abertillery Urban District Council*, (1911) 2 Ch. 398; 80 L. J. Ch. 724.

(*g*) *Poplar Corporation* v. *Millwall Dock Co.*, (1904) 68 J. P. 339.

as it had been done under their statutory powers, and that the erection of the pillar in and under the pavement was not a taking of the plaintiff's land within the meaning of sect. 18 of the Lands Clauses Act, 1845, and that the plaintiff's remedy, if any, was to claim compensation under sect. 68 of that Act, if he could establish that his property had been injuriously affected (*h*).

Building line.

Under the Metropolis Management Act, 1862, 25 & 26 Vict. c. 102, ss. 74, 75, the Board of Works, constituted under the Metropolis Management Act, 1855, had power to require buildings and structures to be set back, paying compensation to the owners; and were also empowered to pull down houses which interfered with the general line of buildings in a street. These provisions are repealed but in substance re-enacted by the London Building Act, 1894 (*i*). Where the provisions of the Metropolis Management Act, 1862, had not been complied with by a local authority, the Court granted an injunction restraining them from interfering with an owner's buildings (*k*).

Where a local authority had prescribed the line in which a building, which had been pulled down, should be rebuilt, the Court restrained the owners from rebuilding otherwise than in the manner prescribed (*l*). Where a building was erected in contravention of sect. 3 of the Public Health (Buildings

(*h*) *Escott* v. *Newport Corporation*, (1904) 2 K. B. 369 ; 73 L. J. K. B. 693.

(*i*) 57 & 58 Vict. c. ccxiii., s. 22, which provides that no "building or structure shall without the consent in writing of the London County Council be erected beyond the general building line of buildings in a street." See *London County Council* v. *Metropolitan Railway Co.*, (1909) 2 K. B. 317 ; 78 L. J. K. B. 830 ; S. C. (1911) A. C. 1 ; 89 L. J. K. B. 35 ; and see sect. 23. As to what are buildings or structures within the meaning of this Act, see *London County Council* v. *Illuminated Advertisements Co.*, (1904) 2 K. B. 886 ; 73 L. J. K. B. 1034 ; *London County Council* v. *Schewzik*, (1905) 2 K. B. 695 ; 74 L. J. K. B. 959 ; *London County Council* v. *Hancock*, (1907) 2 K. B. 45 ; 76 L. J. K. B. 526.

(*k*) *Auckland* v. *Westminster District Board of Works*, L. R. 7 Ch. 597 ; 41 L. J. Ch. 723 ; cf. *London County Council* v. *Pryor*, (1896) 1 Q. B. 330, 465 ; 65 L. J. M. C. 89.

(*l*) *Newhaven Local Board* v. *Newhaven School Board*, 30 C. D. 350, 365. See *Att.-Gen.* v. *Hatch*, (1893) 3 Ch. 36 ; 62 L. J. Ch. 857. *Att.-Gen.* v. *Parish*, (1913) 109 L. T. 57 ; 29 T. L. R. 608 (mandatory injunction to pull down granted).

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in Streets) Act, 1888, the Court, at the suit of the Attorney-General (*m*), granted a mandatory injunction compelling the defendants to pull down so much of the building as infringed the building line, notwithstanding that the section of the Act imposed a penalty for breach of the prohibition, and that the defendants had already been convicted and fined by a Court of summary jurisdiction (*n*).

Width of new streets.

Section 157 of the Public Health Act, 1875, empowers an urban authority to make bye-laws with respect to the width and construction of new streets, and an injunction will be granted at the suit of the Attorney-General against an owner of land constructing or allowing to continue constructed a roadway which is not made in accordance with the bye-laws (*o*).

Thames Embankment Act, 1862.

The Thames Embankment Act, 1862, 25 & 26 Vict. c. 93, incorporates the Lands Clauses Act, 1845, with the additional provision that the word "land" shall include easements and interests in land. The owner of a wharf on the Thames had a right of free access to the river, and also the right of loading and unloading his barges at the wharf, but there was no campshed or hard. The barges only rested at low water on the mud of the foreshore. The Court held that the filling up of the river in front of the wharf was not a taking or using, for the purposes of the undertaking, any easement or interest, and refused to restrain the defendants from proceeding with their works until they had complied with the provisions of sect. 84 of the Lands Clauses Act (*p*).

Thames Conservancy Acts.

By sect. 83 of the Thames Conservancy Act, 1894, which incorporates the Lands Clauses Acts, the Conservators have power to dredge the bed of the river for the purpose of im-

(*m*) See *Mullis* v. *Hubbard*, (1903) 2 Ch. at p. 435; 72 L. J. Ch. 593.

(*n*) *Att.-Gen.* v. *Wimbledon House Estate Co.*, (1904) 2 Ch. 34; 73 L. J. Ch. 593. See *Devonport* v. *Tozer*, (1903) 1 Ch. 759; 72 L. J. Ch. 411.

(*o*) *Att.-Gen.* v. *Gibb*, (1909 2 Ch. 265; 78 L. J. Ch. 521. As to what constitutes laying-out and constructing a new street, see *Devonport* v. *Tozer*, (1903) 1 Ch. 759; 72 L. J. Ch. 411; and *Att.-Gen.* v. *Dorin*, (1912) 1 Ch. 369; 81 L. J. Ch. 225.

(*p*) *Macey* v. *Metropolitan Board of Works*, 33 L. J. Ch. 377. See *The Temple Pier Co.* v. *Metropolitan Board of Works*, 34 L. J. Ch. 262; cf. *Clark* v. *School Board for London*, 9 Ch. 124; 43 L. J. Ch. 421.

proving the navigation. The section, however, is not imperative, and the Conservators will be restrained from exercising their powers so as to injure the property of other parties (*q*).

Compensation.

Where an owner's property is injuriously affected by the proper exercise by corporations of their statutory powers, the remedy of the landowner is to claim compensation under the compensation clauses of the statutes by which the Act is authorised, and not to proceed by action for an injunction or damages, but where corporations interfere with an owner's property in a manner not authorised by their statutes, they will be restrained from so acting, and the owner will not be left to his remedy under the compensation clauses of the Acts (*r*).

Account in cases of trespass for working mines

The account in cases of trespass for the underground working of mines will, in the absence of fraud, be limited to minerals gotten within six years before the bringing of the action (*s*). But the account will not be limited to minerals gotten within six years from the bringing of the action, if the minerals have been taken by a concealed and fraudulent trespass, so long as the party defrauded remains in ignorance without any fault or laches of his own (*t*).

In taking the account in trespass for the underground working of mines, where the minerals have been taken fraudulently, the wrongdoer will be charged the full value of the

(*q*) *East London Railway Co.* v. *Thames Conservators*, (1904) 20 T. L. R. 378. See also the Thames Conservancy Act, 1905 (5 Edw. 7, c. cxcviii.), ss. 3 and 4, as to construction of piers and dredging the bed.

(*r*) See *Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 H. L. C. 600, 612; 29 L. J. Ch. 379; *Sellors* v. *Matlock Bath Local Board*, 14 Q. B. D. 928; 52 L. T. 762; *Bedford (Duke)* v. *Dawson*, L. R. 20 Eq. 353; 44 L. J. Ch. 549; *Grand Junction Canal Co.* v. *Shugar*, L. R. 6 Ch. 483; 24 L. T. 402; *Wigram* v. *Fryer*, 36 C. D. 87; 56 L. J. Ch. 1098; *Kirby* v. *Harrogate School Board*, (1896) 1 Ch. 449; 65 L. J. Ch. 376; *Barnard* v. *Great Western Railway Co.*, (1902) 86 L. T. 798; *Piggott* v. *Middlesex County Council*, (1909) 1 Ch. 134, 145; 77 L. J. Ch. 813.

(*s*) *Dean* v. *Thwaite*, 21 Beav. 623; 111 R. R. 228; *Dawes* v. *Baynall*, 23 W. R. 690; *Trotter* v. *Maclean*, 13 C. D. 587; 49 L. J. Ch. 256; *Glyn* v. *Howell*, (1909) 1 Ch. 666; 78 L. J. Ch. 391.

(*t*) *Bulli Coal Mining Co.* v. *Osborne*, (1899) A. C. 351; 68 L. J. P. C. 49.

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minerals when gotten; without being allowed the expenses of getting or severing them, although the expenses of raising the coal to the pit's mouth will be allowed (*u*). But if there be no suggestion of fraud, the trespasser will be treated as the purchaser at the pit's mouth, and must pay the market value of the minerals at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing them to bank, so as to place the owner in the same position as if he had himself severed and raised the minerals (*x*).

Damages.

If there be evidence of damage to the mine from wrongful working, an inquiry will be directed as to what should be allowed to the plaintiff as compensation for such damage (*y*). The defendant may be ordered to pay the plaintiff compensation for the damage done by breaking down the barrier between the mines (*z*), or for the damage sustained by the plaintiff in being obliged to leave additional barriers (*a*). He may also be charged with a way-leave rent in respect of air courses and roads through the mine of the plaintiff (*b*).

If a man trespass on the mine of another and wrongfully work it, and get coal there, but in the course of his working leave other coal unworked, which by reason of his wrongful working becomes so diminished in value that he cannot work it at a profit, the mine owner is entitled to damages for the

(*u*) *Martin* v. *Porter*, 5 M. & W. 351; 52 R. R. 745; *Phillips* v. *Homfray*, 6 Ch. 770; *Llynvi Co.* v. *Brogden*, 11 Eq. 188; 40 L. J. Ch. 46; *Trotter* v. *Maclean*, 13 C. D. 587; 49 L. J. Ch. 256, *Taylor* v. *Mostyn*, 33 C. D. 226; 55 L. J. Ch. 893; and see *Whitwham* v. *Westminster Brymbo Coal, etc., Co.*, (1896) 2 Ch. 538; *Bulli Coal Mining Co.* v. *Osborne*, (1899) A. C. p. 362; 68 L. J. P. C. 52.

(*x*) *Jegon* v. *Vivian*, 6 Ch. 742; 40 L. J. Ch. 389; *Re United Merthyr Collieries Co.*, 15 Eq. 47; *Ashton* v. *Stock*, 6 C. D. 719; *Livingstone* v. *Rawyards Coal Co.*, 5 A. C. 25, 40; *Trotter* v. *Maclean*, 13 C. D. 587; 49 L. J. Ch. 256. See *Ashover Fluor Spar Mines Co.* v. *Jackson*, (1911) 2 Ch. 356; 80 L. J. Ch. 687.

(*y*) *Jegon* v. *Vivian*, *supra*; *Taylor* v. *Mostyn*, *supra*.

(*z*) *Llynvi* v. *Brogden*, 11 Eq. 188, 192; 40 L. J. Ch. 46.

(*a*) *Powell* v. *Aikin*, 4 K. & J. 343; 116 R. R. 355.

(*b*) *Jegon* v. *Vivian* 6 Ch. 742; 40 L. J. Ch. 389; *Philips* v. *Homfray*, 6 Ch. 780; and see *Whitwham* v. *Westminster Brymbo Coal, etc., Co.*, (1896) 1 Ch. 894; (1896) 2 Ch. 538.

coal so rendered useless, as well as for that actually gotten by the defendant (*c*).

Coprolites beneath the surface of a copyhold tenement are minerals, and the property in them is in the lord, who cannot, however, dig for them without the copyholder's permission. In a case where the lord of a manor had entered upon a copyhold tenement and taken coprolites without the consent of the copyholder, it was held that the copyholder could maintain an action for an injunction and damages, and that the proper measure of damages was the gross amount produced by the sale of the coprolites, less the expenses of the working, and such a sum by way of profit as would have induced a stranger to undertake the working (*d*).

(*c*) *Williams* v. *Raggett*, 25 W. R. 874; 46 L. J. Ch. 849.

(*d*) *Att.-Gen.* v. *Tomline*, 5 C. D. 750; 46 L. J. Ch. 654.

CHAPTER VI.

INJUNCTIONS AGAINST NUISANCE.

SECTION 1.—PRINCIPLES ON WHICH THE COURT ACTS IN RESTRAINING NUISANCE.

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THE jurisdiction of the Court by way of injunction in cases of nuisance is in aid of the legal right, and has for its object the protection of property from irreparable or at least from substantial and material damage pending the trial of the right. If the injury is of so material a nature that it cannot be well or fully compensated by the recovery of damages, or be such as from its continuance and permanent mischief might occasion a constantly recurring grievance, a foundation is laid for the interference of the Court by way of injunction (*a*). The jurisdiction was formerly exercised sparingly and with caution (*b*), but it is now fully established, and will be exercised as freely as in other cases in which the aid of the Court is sought for the purpose of protecting legal rights from violation.

Nuisance as distinguished from trespass.

A nuisance is an act unaccompanied by an act of trespass, which causes a substantial injury to the corporeal or incorporeal hereditaments of other persons. In the case of trespass it is the immediate act which causes the injury; in the case of nuisance the injury is the consequence of an act done beyond the bounds of the property affected by it (*c*).

Nuisances may be either of a private or a public nature.

(*a*) *Att.-Gen.* v. *Nicholl*, 16 Ves. 338; 10 R. R. 186; *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. p. 319; 22 L. J. Ch. 811; *Wilson* v. *Townend*, 1 Dr. & Sm. 329.

(*b*) *Ripon* (*Earl of*) v. *Hobart*, 3 M. & K. p. 180; 3 L. J. (N. S.) Ch. 145, *per* Lord Brougham.

(*c*) *Reynolds* v. *Clarke*, 2 Lord Raym. 1399; *Weeton* v. *Woodcock*, 5 M. & W. 594; 10 L. J. Ex. 183; 56 R. R. 606; *Lemmon* v. *Webb*, (1894) 3 Ch. 1, 24; 63 L. J. Ch. 570; (1895) A. C. p. 5; *Smith* v. *Giddy*, (1904) 2 K. B. 450; 91 L. T 296; *Kine* v. *Jolly*, (1905) 1

Nuisances are public or private.

The only distinction between the two cases is, that a private nuisance is an injury to the property of an individual, while a public nuisance is an injury to the property of all persons who come within the sphere of its operation (*d*). "I conceive," said Kindersley, V.-C., in *Soltau* v. *De Held* (*e*), "that to constitute a public nuisance, the thing must be such as in its nature and consequences is a nuisance, an injury, or damage to all persons coming within the sphere of its operations, though it may be so in a greater degree to some than it is to others. For example, take the case of the operations of a manufactory, in the course of which operations volumes of smoke or of noxious effluvia are emitted. To all persons who are at all within the range of these operations, it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that to those who are nearer to it, it may be a greater nuisance, a greater inconvenience, than it is to those who are more remote from it; but still to all who are within the reach of it, it is more or less a nuisance or an inconvenience. Take another ordinary case, the most ordinary case of a public nuisance, the stopping of the king's highway, that is a nuisance to all who may have occasion to travel that highway. It may be a much greater nuisance to a person who has to travel it every day of his life, than it is to a person who has to travel it once a year or once in five years; but it is more or less a nuisance to everyone who has occasion to use it. If, however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operations, but is no nuisance or inconvenience whatever, or is even advantageous or pleasurable to those who are more removed from it, then, I conceive, it does not come within the meaning of the term public nuisance (*f*). The case before me is a case in point. A peal of bells may be and is no doubt an extreme nuisance to a person who lives within

(*d*) See *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. p. 320; 22 L. J. Ch. p. 813.

(*e*) 2 Sim. N. S. p. 142; 21 L. J. Ch. 153; 89 R. R. 245.

(*f*) See *Squire* v. *Campbell*, 1 M. & C. 459, 486; 6 L. J. (N. S.) Ch. 41; 43 R. R. 231.

Ch. p. 487; 74 L. J. Ch. 184; and see *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. 526, 550; 78 L. J. Ch. 1.

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a very few feet or yards of them; but to a person who lives at a distance from them, although he is within the reach of their sound, it may be a positive pleasure, for I cannot assent to the proposition that in all circumstances and under all conditions the sound of bells must be a nuisance. . . . I may further say that it does not follow because a thing complained of is a nuisance to several individuals, that therefore it is a public nuisance. One may illustrate this very simply by supposing the case of a man building up a wall which has the effect of darkening the ancient lights of half a dozen dwelling-houses. It does not follow, because half a dozen persons or a dozen persons are suffering by the darkening of their ancient lights by the one wall, that therefore it is a public nuisance which can be indicted at the suit of the Crown, or for which the Attorney-General can file an information in this Court. It is a private nuisance to each of the individuals aggrieved "(*g*).

Public nuisance. Who should sue.

If the thing complained of is in its nature a public nuisance, the remedy is by action in the nature of an information at the suit of the Attorney-General (*h*). The circumstance, however, that the thing complained of may be a public nuisance, does not prevent an individual who has sustained special damage from bringing an action (*i*). There may, in such cases, be

(*g*) See *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. 304, 325; 22 L. J. Ch. 811; *Att.-Gen.* v. *Brighton, etc., Supply Association*, (1900) 1 Ch. 276; 69 L. J. Ch. 204.

(*h*) *Soltau* v. *De Held*, 2 Sim. N. S. p. 150; 21 L. J. Ch. 153; 89 R. R. 245; *Tottenham Urban District Council* v. *Williamson and Sons, Ltd.*, (1896) 2 Q. B. 353; 65 L. J. Q. B. 591 (C. A.); *Att.-Gen.* v. *Scott*, (1904) 1 K. B. p. 407; 73 L. J. Q. B. 196; (1905) 2 K. B. 160; 74 L. J. Q. B. 803.

(*i*) *Soltau* v. *De Held*, 2 Sim. N. S. p. 151; 21 L. J. Ch. 153; 89 R. R. 245; *Cook* v. *Mayor, etc., of Bath*, 6 Eq. 177, 180; *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316; 36 L. J. Ex. 194; *Benjamin* v. *Storr*, L. R. 9 C. P. 400, 407; 43 L. J. C. P. 162; *Att.-Gen.* v. *Logan*, (1891) 2 Q. B. 100; *Barber* v. *Penley*, (1893) 2 Ch. 447; 62 L. J. Ch. 623; *Martin* v. *London County Council*, (1899) 80 L. T. 866; *Chaplin & Co.* v. *Westminster Corporation*, (1901) 2 Ch. p. 334; 70 L. J. Ch. 679; *Att.-Gen.* v. *Brighton and Hove Corporation Association*, (1900) 1 Ch. 276; 69 L. J. Ch. 204; *Smith* v. *Wilson*, (1903) 2 Ir. R. p. 75; *Boyce* v. *Paddington Borough Council*, (1903) 1 Ch. p. 114; 72 L. J. Ch. 28; *Sherringham Urban District Council* v. *Holsey*, (1904) 91 L. T. 225; *Cavan County Council* v. *Kane & Co.*, (1910) 2 Ir. R. 644; *Campbell*

both an information and an action. The Attorney-General may file an information to restrain the thing complained of as a public nuisance, and the individual who sustains a particular damage may join as plaintiff, as well as relator, and have the remedy for himself by action (*k*). The fact that an individual may be nearer a possible cause of injury, does not entitle him to maintain an action if he has not sustained any private damage, and there is no reason to apprehend that he will sustain any (*l*). Nor can an individual sue, though he may be more damaged by the act complained of than the rest of the public, if it has been authorised by statute, and is one which from its nature must necessarily prove a nuisance, to some one or other of the public (*m*). A public company exceeding its legislative limits cannot be restrained by injunction at the suit of a rival company, which does not allege that it has sustained some private injury by such excess, though the act complained of may be injurious to the public interest (*n*).

The right of prosecution given to the Home Secretary by the Act 21 & 22 Vict. c. 104, s. 31, does not supersede the right of persons aggrieved by a nuisance to have an injunction (*o*).

v. *Paddington Corporation*, (1911) 1 K. B. 869, 874; 80 L. J. K. B. 739.

(*k*) *Att.-Gen.* v. *Forbes*, 2 M. & C. 123; 45 R. R. 15; *Soltau* v. *De Held*, 2 Sim. N. S. p. 151; 21 L. J. Ch. 153; 89 R. R. 245; *Att.-Gen.* v. *United Kingdom Electric Telegraph Co.*, 30 Beav. 287; *Att.-Gen.* v. *Lord Lonsdale*, 7 Eq. 377; 38 L. J. Ch. 335; *Att.-Gen.* v. *Logan*, (1891) 2 Q. B. 100; and see *Att.-Gen.* v. *Brighton Supply Association*, (1900) 1 Ch. 276; 69 L. J. Ch. 204; *Att.-Gen.* v. *Scott*, (1904) 1 K. B. 404; 73 L. J. K. B. 196; (1905) 2 K. B. 160; 74 L. J. K. B. 803; *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 495; 27 T. L. R. 531.

(*l*) *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 212; 28 L. J. Ch. 153; 121 R. R. 80.

(*m*) *Att.-Gen.* v. *Thames Conservators*, 1 H. & M. 1; *Att.-Gen.* v. *Metropolitan Board of Works*, ib. p. 313. See *Biddulph* v. *St. George's Vestry*, 3 De G. J. & S. 493; 33 L. J. Ch. 411; *Chaplin & Co.* v. *Westminster Corporation*, (1901) 2 Ch. 329; 70 L. J. Ch. 679.

(*n*) *Stockport and District Waterworks Co.* v. *Mayor, etc., of Manchester*, 9 Jur. N. S. 266; 7 L. T. 345; *Pudsey Gas Co.* v. *Corporation of Bradford*, 15 Eq. 167. See *Marriott* v. *East Grinstead Gas Co.*, (1909) 1 Ch. p. 78; 78 L. J. Ch. 141.

(*o*) *Att.-Gen.* v. *Metropolitan Board of Works*, 1 H. & M. 298.

Grounds for refusing injunction.

The motives with which a suit is instituted to enforce a right are not generally to be regarded, but if it can be shown satisfactorily that the suit has been instituted by one man merely for the purposes of or at the instigation of another, the Court will not relieve (*p*). The fact, however, that the suit may have been got up by a third party is not enough to deprive a man of his right to have a nuisance discontinued (*q*). Nor is it wholly immaterial, where the public interest purports to be asserted or an injunction is sought on public grounds, at least upon an *interlocutory application*, to look into the motives from which or under which the matter is brought forward. If a large number of the public are in favour of the acts sought to be restrained and no proof of serious damage to individuals be made to appear, the Court will not interfere upon an interlocutory application unless the public good requires the issuing of the injunction (*r*).

Who should sue.

The action is usually brought by the occupier or by the lessee in possession, but the owner may sue on the ground of injury to his property, either alone or conjointly with the occupier (*s*). A lessee whose tenancy has expired during the establishment of the nuisance, but who has agreed for a renewal of the lease, may maintain an action (*t*). So also may a tenant from year to year, or even, it seems, a weekly tenant (*u*), but not a person in possession of premises

(*p*) *Pentney* v. *Lynn Commissioners*, 13 W. R. 983. See *Davies* v. *Gas Light and Coke Co.*, (1909) 1 Ch. p. 254 ; 78 L. J. Ch. 445.

(*q*) *Turner* v. *Mirfield*, 34 Beav. 390, 392.

(*r*) *Att.-Gen.* v. *Sheffield Gas Co.* 3 De G. M. & G. 311, 312 ; 22 L. J. Ch. 811 ; *Att.-Gen.* v. *Cambridge Consumers' Gas Co.*, 4 Ch. 71 ; 38 L. J. Ch. 94.

(*s*) *Wilson* v. *Townend*, 1 Dr. & Sm. 324 ; 30 L. J. Ch. 25 ; *Jackson* v. *Duke of Newcastle*, 3 De G. J. & S. 275 ; 33 L. J. Ch. 698 ; *Broder* v. *Saillard*, 2 C. D. 692 ; 45 L. J. Ch. 14 ; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. p. 314 ; 64 L. J. Ch. 216 ; *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. 707 ; 73 L. J. Ch. 275 ; and see *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. 393, 404 ; 80 L. J. Ch. p. 150 ; *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 495 ; 27 T. L. R. 581.

(*t*) *Gale* v. *Abbott*, 8 Jur. N. S. 987 ; 10 W. R. 748.

(*u*) *Simper* v. *Foley*, 2 J. & H. 555 ; *Inchbald* v. *Robinson*. 4 Ch. 388, 395 ; 20 L. T. N. S. 259 ; *Jones* v. *Chappell*, 20 Eq. 539, 544 ; 44 L. J. Ch. 658. See *Plake* v. *Hall*, 31 Sol. J. 744.

who has no interest in, or right of occupation of the property in the proper sense of the term (*x*).

Mortgagees.

A mortgagee of land after entry may maintain an action for a nuisance committed between the date when his right to enter accrued and that of his actual entry into possession (*y*).

Suit by reversioner.

In order that a reversioner should be able to bring an action for a nuisance it is necessary that the wrong complained of should operate injuriously to the reversion, either by being of a permanent character or by operating as a denial of right (*z*). One of several tenants in common of a reversion can sue in respect of wrongful acts causing injury to the reversion (*a*).

Lessee.

If the action is brought by the occupier or lessee in possession, the landlord or reversioner need not be made a party (*b*).

Bankrupt.

An undischarged bankrupt who is in possession may, it seems, sue in respect of a nuisance without joining his trustee where the damage to his property is merely nominal, the principal and essential cause of action being in respect of the personal annoyance and inconvenience to the bankrupt himself (*c*).

When the occupier of land grants a licence to another to do certain acts on the land, and the licensee in doing them com-

(*x*) *Malone* v. *Laskey*, (1907) 2 K. B. 141; 76 L. J. K. B. 1134.

(*y*) *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, (1905) 2 K. B. 493; 74 L. J. K. B. 799 (equitable mortgagees).

(*z*) *Wilson* v. *Townend*, 1 Dr. & Sm. 329; 30 L. J. Ch. 25; *Johnstone* v. *Hall*, 2 J. & H. 414; 25 L. J. Ch. 92; 110 R. R. 296; *Bell* v. *Lleland Railway Co.*, 19 C. B. N. S. 287; 30 L. J. C. P. 273; *Jackson* v. *Duke of Newcastle*, 3 De. G. J. & S. 275; 33 L. J. Ch. 698; *Mott* v. *Shoolbred*, 20 Eq. 23; 44 L. J. Ch. 380; *Cooper* v. *Crabtree*, 20 C. D. 590; 51 L. J. Ch. 544; *Mayfair Property Co.* v. *Johnston*, (1894) 1 Ch. 508; 63 L. J. Ch. 389; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. 314, 317; 64 L. J. Ch. 216; *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. 707, 713; 73 L. J. Ch. 275; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. 393, 404; 80 L. J. Ch. p. 150.

(*a*) *Roberts* v. *Hollands*, (1893) 1 Q. B. 665; 62 L. J. Q. B. 621.

(*b*) *Semple* v. *London and Birmingham Railway Co.*, 9 Sim. 209; see *Thorpe* v. *Brumfitt*, 8 Ch. 650; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. p. 318; 64 L. J. Ch. 216; and *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 495; 27 T. L. R. 581.

(*c*) *Semple* v. *London and Birmingham Railway Co.*, 9 Sim. 209; *Rogers* v. *Spence*, 13 M. & W. 571;

mits a nuisance, the occupier may be made a defendant to an action to restrain the nuisance (*d*). So also the occupier of a house may be made a defendant to an action for allowing the continuance on his premises of any artificial work which causes a nuisance to his neighbour, even though it has been put there before he took possession (*e*). Leave may be obtained to add as parties occupiers who have acquired an interest since the writ was issued (*f*).

Liability of owner of vacant land for nuisance.

In a case in which the defendant was the owner and occupier of a vacant piece of land in the metropolis which he had surrounded with a hoarding, but people threw filth and refuse over the hoarding on to the land, so that the condition of the land became a public nuisance, it was held that there was a common law duty upon the defendant, who was aware of what was being done, to prevent the land being so used as to be a nuisance, and that the Attorney-General was entitled to an injunction to enforce the performance of such duty (*g*).

Nuisance arising from acts of several persons.

The acts of several persons may together constitute a nuisance, which the Court will restrain, though the damage occasioned by the acts of any one, if taken alone, would not be a nuisance (*h*).

When the Court will interfere.

The Court will not as a rule interfere by injunction if the damage is slight or the nuisance is merely of a temporary or occasional character (*i*): but a damage, though in itself

15 L. J. Ex. 49; 67 R. R. 736; *Rose* v. *Buckett*, (1901) 2 K. B. 449, 456; 70 L. J. K. B. 736; *Lord* v. *Great Eastern Railway Co.*, (1908) 1 K. B. 195, 202.

(*d*) *White* v. *Jameson*, 18 Eq. 303; and see *Chibnell* v. *Paul*, 29 W. R. 536; *Jenkins* v. *Jackson*, 40 C. D. 71, 77; 58 L. J. Ch. 124; *Williams* v. *Gabriel*, (1906) 1 K. B. p. 158; 75 L. J. K. B. 146.

(*e*) *White* v. *Jameson*, 18 Eq. 303; *Broder* v. *Saillard*, 2 C. D. 692; 45 L. J. Ch. 414.

(*f*) *House Property, etc., Co.* v. *Horse Nail Co.*, 29 C. D. 190; 54 L. J. Ch. 715.

(*g*) *Att.-Gen.* v. *Tod-Heatley*, (1897) 1 Ch. 560; 66 L. J. Ch. 275. See *Barker* v. *Herbert*, (1911) 2 K. B. 633, 641; 80 L. J. K. B. 1329, 1334.

(*h*) *Thorpe* v. *Brumfitt*, 8 Ch. 650, 656; *Lambton* v. *Mellish*, (1894) 3 Ch. 163; 63 L. J. Ch. 929; and see *Sadler* v. *Great Western Railway Co.*, (1896) A. C. 450; 65 L. J. Q. B 462.

(*i*) *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. 304, 322; 22 L. J. Ch. 811; *Swaine* v. *Great Northern Railway Co.*, 4 De G. J. & S. 211; 33 L. J. Ch. 399; *Cooke*

slight, may from its continuance, or constant repetition, become sufficiently substantial for the interference of the Court (*k*). If a defendant causes a nuisance to his neighbour, it is no defence to say that he is making a reasonable use of his premises (*l*). In estimating the injury the Court has regard to all the consequences which may flow from the nuisance, not only to its present effect upon the comfort and convenience of the occupier, but also to any prospective increase of the nuisance and the probable detriment of the estate. If the Court is satisfied that some degree of nuisance has been proved to exist, and to have been increasing, the Court, in determining whether it should interfere, must have regard to its further continuance or increase: the interference of the Court in cases of prospective injury must depend upon the nature and intent of the apprehended mischief, and upon the certainty or uncertainty of its increase or continuance; and the fact of the nuisance having commenced raises a presumption of its continuance (*m*). In determining whether the injury is serious or not, regard must be had to all the conse-

v. *Forbes*, 5 Eq. 166; 37 L Ch. 178; *Goldsmith* v. *Tunb Wells Improvement Commissio.* L. R. 1 Ch. p. 355; 35 L. J. Ch. 382; *Att.-Gen.* v. *Consumers' Gas Co.*, 4 Ch. 71, 80; 38 L. J. Ch. 94; *Harrison* v. *Southwark and Vauxhall Water Co.*, (1891) 2 Ch. 409; 60 L. J. Ch. 630; *Hosnell* v. *Aerated Bread Co.*, (1894) 10 T. L. R. 661; *Llandudno Urban Council* v. *Woods*, (1899) 2 Ch. 705; 68 L. J. Ch. 623; *Att.-Gen.* v. *Mayor, etc., of Preston*, 13 T. L. R. 14; *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. p. 711; 73 L. J. Ch. 275; *Behrens* v. *Richards*, (1905) 2 Ch. 614; 74 L. J. Ch. 615; but see *Att.-Gen.* v. *Keymer Brick Co.*, (1903) 67 J. P. 434 (nuisance from smells in the summer months); *Andrews* v. *Abertillery Urban Council*, (1911) 2 Ch. 398; 80 L. J. Ch. 724.

(*k*) *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. 304; 22 L. J. Ch. 811; *Att.-Gen.* v. *Consumers' Gas Co.*, 4 Ch. 81; 38 L. J. Ch. 94; *Grand Junction Canal Co.* v. *Shugar*, 6 Ch. 489; *Clewes* v. *Staffordshire Potteries Co.*, 8 Ch. 142; *Thorpe* v. *Brumfitt*, ib. 656; *Lambton* v. *Mellish*, (1894) 3 Ch. 163; 63 L. J. Ch. 929.

(*l*) *Reinhardt* v. *Mentasti*, 42 C. D. 685; 58 L. J. Ch. 787; *Att.-Gen.* v. *Cole*, (1901) 1 Ch. 205; 70 L. J. Ch. 148; and see *Knight* v. *Isle of Wight Electric Light Co.*, (1904) 73 L. J. Ch. 299; 90 L. T. 410. Cf., however, *Sanders-Clark* v. *Grosvenor Mansions Co.*, (1900) 2 Ch. 373; 69 L. J. Ch. 579.

(*m*) *Goldsmid* v. *Tunbridge Wells Commissioners*, 1 Ch. 349, 354; 35 L. J. Ch. 382.

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quences which may flow from it (*n*). The mere fact that a certain act may cause a diminution in the value of property does not make that act a nuisance (*o*), but diminution in the value of property is often of great moment as evidence of the extent of a nuisance (*p*).

Evidence of scientific witnesses.

In estimating the character of a nuisance, more weight is due to the facts which are proved than to the conclusions drawn from scientific investigations. The conclusions to be drawn from scientific investigations are of value in aid or explanation and qualification of the facts which are proved; but it is upon the facts which are proved, and not upon such conclusions, that the Court ought mainly to rely (*q*).

"Nuisance by exercise of limited right, in excess."

Where a man who is entitled to a limited right exercises it in excess so as to produce a nuisance, and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it altogether within its proper limits (*r*).

Cesser of nuisance after action brought.

If a plaintiff applies for an injunction to restrain the violation of a common law right and establishes his right at law, he is entitled, except under special circumstances, to an injunction as of course (*s*). The Court can grant an injunction

(*n*) *Goldsmid* v. *Tunbridge Wells Commissioners*, 1 Ch. 349; 35 L. J. Ch. 382; *Att.-Gen.* v. *Mayor, etc., of Basingstoke*, 45 L. J. Ch. 729. See *Jones* v. *Llanrwst Urban District Council*, (1911) 1 Ch. 393; 80 L. J. Ch. 145.

(*o*) *Squire* v. *Campbell*, 1 M. & C. 459, 486; 6 L. J. (N. S.) Ch. 41; 43 R. R. 231; *Soltau* v. *De Held*, 2 Sim. N. S. 133, 158; 21 L. J. Ch. 153; 89 R. R. 245; *Harrison* v. *Goode*, 11 Eq. p. 353; 40 L. J. Ch. 194.

(*p*) *Soltau* v. *De Held*, 2 Sim. N. S. p. 158; 21 L. J. Ch. 153; 89 R. R. 245; *White* v. *Cohen*, 1 Drew. 318. See *Jackson* v. *Duke of Newcastle*, 3 De G. J. & S. 285; 33 L. J. Ch. 698.

(*q*) *Goldsmid* v. *Tunbridge Wells Commissioners*, 1 Ch. 349, 353; 35 L. J. Ch. 382; *Att.-Gen.* v. *Colney Hatch Asylum*, 4 Ch. p. 156; 38 L. J. Ch. 265.

(*r*) *Cawkwell* v. *Russell*, 26 L. J. Ex. 34; *Hill* v. *Cock*, 26 L. T. p. 186; *Charles* v. *Finchley Local Board*, 23 C. D. pp. 773, 775; 52 L. J. Ch. 554.

(*s*) *Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 H. L. C. 600; and *Saunby* v. *London (Ont.) Water Commissioners*, (1906) A. C. pp. 115, 116; 75 L. J. P. C. 25; *Att.-Gen.* v. *Birmingham, Tame, etc., District Board*, (1910) 1 Ch. p. 60; 79 L. J. Ch. 137; and *ante*, p. 32.

where the nuisance has ceased after action brought, though there is no doubt that the Court can, in such a case, in the exercise of its discretion, refuse the injunction (*t*).

Threatened injury.

The Court will not in general interfere until an actual nuisance has been committed; but it may, by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance (*u*). The plaintiff, however, must show a strong case of probability that the apprehended mischief will in fact arise in order to induce the Court to interfere (*x*). If there is no reason for supposing that there is any danger of mischief of a serious character being done before the interference of the Court can be invoked, an injunction will not be granted. In a case, accordingly, where no actual damage had been done, and it appeared to the Court that it was quite possible, by the use of due care, to prevent a foul liquid from flowing into a river, as well as that some method might be discovered of rendering the liquid innocuous, the Court would not grant an injunction (*y*).

Intention of defendant not to commit nuisance.

If the defendant asserts positively that his acts will not

(*t*) *Chester* (*Dean*) v. *Smelting Corporation*, 85 L. T. 67; (1901) W. N. 179; *Batcheller* v. *Tunbridge Wells Gas Co.*, 84 L. T. 765; 17 T. L. R. 577; *Barber* v. *Penley*, (1893) 2 Ch. pp. 460, 461; 62 L. J. Ch. 623; *Dunning* v. *Grosvenor Dairies, Ltd.*, (1900) W. N. 265; *Carr & Co.* v. *Bath Gas and Coke Co.*, ib. 265, n.; *Att.-Gen.* v. *Staines Rural District Council and Squire*, (1906) 70 J. P. Notes of Cases, 545.

(*u*) *Haines* v. *Taylor*, 2 Ph. 209; 78 R. R. 71; *Dawson* v. *Paver*, 5 Ha. 415, 430; 16 L. J. Ch. 274; 71 R. R. 155; *Potts* v. *Levy* 2 Drew. 272; 100 R. R. 131; *Elwell* v. *Crowther*, 31 Beav. 169; *Att.-Gen.* v. *Corporation of Manchester*, (1893) 2 Ch. 87; 62 L. J. Ch. 459 (C. A.); *Att.-Gen.* v. *Nottingham Corporation*, (1904) 1 Ch. 677; 73 L. J. Ch. 512.

(*x*) *Att.-Gen.* v. *Corporation of Manchester*, (1893) 2 Ch. 87; 62 L. J. Ch. 459; and see *Ripon* (*Earl of*) v. *Hobart*, 3 M. & K. 169; 3 L. J. (N. S.) Ch. 145; 41 R. R. 40; *Att.-Gen.* v. *Mayor of Kingston*, 34 L. J. Ch. 481; *Att.-Gen.* v. *Rathmines, etc., Hospital Board*, (1904) 1 Ir. R. 161; *Att.-Gen.* v. *Nottingham Corporation*, *supra*.

(*y*) *Fletcher* v. *Bealey*, 28 C. D. 688; 54 L. J. Ch. 424; and see *Att.-Gen.* v. *Corporation of Manchester*, (1893) 2 Ch. 87; 62 L. J. Ch. 459. As to form of order in *Fletcher* v. *Bealey*, see 33 W. R. 748; 54 L. J. Ch. p. 431.

cause a nuisance, or that it is his intention to guard against committing nuisance, and there is no reason to discredit the assertion, the Court will not interfere (*z*), even though he refuses to give an undertaking (*a*); but if he claims the right to do the act complained of and refuses to give an undertaking, the Court will infer that there will be a repetition of the nuisance (*b*).

Action by a purchaser.

It seems that a purchaser who has not accepted the title cannot sue anyone (other than the vendor) to protect the property from injury (*c*).

Nuisance by incorporated companies.

Companies incorporated by Act of Parliament and having compulsory powers to take lands and construct works, are bound to act in good faith and in strict accordance with the powers which have been vested in them by the legislature. If they act in excess of their statutory powers and cause damage to the property of others, or if, though keeping within their statutory powers, they construct their works in so unskilful or negligent or unreasonable a manner as to cause unnecessary injury to private rights, the parties aggrieved thereby may maintain actions against them, and may, when such is the appropriate remedy, obtain an injunction (*d*).

(*z*) *Warburton* v. *London and Blackwall Railway Co.*, 1 Ra. Ca. 558; *Haines* v. *Taylor*, 2 Ph. 209; 78 R. R. 71; *Wandsworth Board of Works* v. *London and South Western Railway Co.*, 31 L. J. Ch. 854; *Fletcher* v. *Bealey*, 28 C. D. 688; 54 L. J. Ch. 424. See *Proctor* v. *Bayley*, 42 C. D. 390; 59 L. J. Ch. 12.

(*a*) *Cowley* v. *Byas*, 5 C. D. 944.

(*b*) *Phillips* v. *Thomas*, 62 L. T. 793.

(*c*) *Heath* v. *Maydew*, 13 W. R. 199. *Sed quære.*

(*d*) *Frewin* v. *Lewis*, 4 M. & C. 249, 255; 48 R. R. 88; *Vaughan* v. *Taff Vale Railway Co.*, 29 L. J. Ex. 247; 5 H. & N. p. 685; *Imperial Gas Co.* v. *Broadbent*, 7 De G. M. & G. 436, 459; 7 H. L. C. 600; 29 L. J. Ch. 377; *Grand Junction Canal Co.* v. *Shugar*, 6 Ch. 483, 488; *Clowes* v. *Staffordshire Railway Co.*, 8 Ch. 125, 139; 42 L. J. Ch. 107; *Geddis* v. *Proprietors of Bann Reservoir*, 3 A. C. 430; *Lambert* v. *Corporation of Lowestoft*, (1901) 1 Q. B. 590, 594; 70 L. J. K. B. 333; *East Fremantle Corporation* v. *Annois*, (1902) A. C. pp. 218, 219; 71 L. J. P. C. 39; *Roberts* v. *Charing Cross, Euston, and Hampstead Railway Co.*, (1903) 87 L. T. 732; *East London Railway Co.* v. *Thames Conservancy*, (1904) 68 J. P. 302; *Midwood* v. *Manchester Corporation*, (1905) 2 K. B. p. 606; 74 L. J. K. B. 884; *Westminster Corporation* v. *London and North Western Railway Co.*, (1905) A. C. pp. 430, 432; 74 L. J. Ch. 629; *Tilling & Co.* v. *Dick Kerr & Co.*, (1905) 1 K. B. 562; 74

That statutory powers must be exercised in a reasonable manner and so as not to cause more damage than necessary, is well illustrated by the following case (*e*). The plaintiffs, a water company, claimed an injunction to restrain a local body from lowering the surface of certain streets under which the plaintiffs' pipes were laid in such a manner as to leave the pipes without a sufficient covering of soil to protect them from injury by frost or otherwise. The real dispute was whether the plaintiffs or the defendants ought to bear the cost of lowering the position of the pipes. The injunction was refused. Collins, L. J., in his judgment (*f*), said: "The point urged is that the plaintiffs have suffered damage by the exercise by the defendants of their statutory powers; that the defendants were armed by the same statute (*g*) with other powers which, if used, would have mitigated the damage, and that therefore they were bound to use them. . . . It is not on the assertion of a statutory duty that the argument for the defendants' liability is, or must be, based, but on the broader proposition that being possessed of a power of mitigating damage arising from their proceedings under the statute, they are bound to exercise it. So stated it is merely an assertion of the proposition so frequently affirmed that where statutory rights infringe what but for the statute would be the rights of other persons, they must be exercised reasonably so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers. . . . Here the levelling of the road could be, and was effectually carried out without in any way disturbing the plaintiffs' pipes or infringing any of their rights. . . . But it must be admitted that the defendants are bound to exercise their statutory powers with reasonable regard for the rights of other persons. I think when it is once clear that the main

L. J. K. B. 359; *Piggott* v. *Middlesex County Council*, (1909) 1 Ch. p. 145; 77 L. J. Ch. 813. See *McClelland* v. *Manchester Corporation*, (1912) 1 K. B. p. 129; 81 L. J. K. B. p. 104.

(*e*) *Southwark, etc., Water Co.* v. *Wandsworth Board of Works*, (1898) 2 Ch. 603; 67 L. J. Ch. 57.

(*f*) (1898) 2 Ch. 610—612; 67 L. J. Ch. 657.

(*g*) Metropolis Management Act, 1855.

purpose of the defendants could be completely carried out without recourse to the power of moving the pipes, the obligation of the statutory body must be tried by the same standard of duty as is applicable to private persons. Of course, being merely a creature of statute they cannot exercise powers if the statute has not conferred them; but it does not follow that they are bound to use them because they possess them any more than a private person would be. They merely fall under the general principle *sic utere tuo ut alienum non lædas*" (*h*).

Nuisances by public companies.

In a case in which a railway company was proceeding to erect an arch over a mill race for the purpose of sustaining an embankment on which the railway was to be constructed, and it appeared that injury would be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions, an injunction was granted to restrain the company from making an arch of less than certain specified dimensions (*i*). The 16th clause of the Railways Clauses Consolidation Act (*k*), which authorises various works to be executed, contains a proviso that in the exercise of their powers the company shall do as little damage as can be. This proviso does not apply to what is to be done in the execution of the powers, but to the *manner* of doing it (*l*).

(*h*) See *Roberts* v. *Charing Cross, Euston, and Hampstead Railway*, (1903) 87 L. T. 732; *Westminster Corporation* v. *London and North Western Railway Co.*, (1905) A. C. pp. 430, 433; 74 L. J. Ch. 629; *Tilling & Co.* v. *Dick Kerr & Co.*, (1905) 1 K. B. 562; 74 L. J. K. B. 359; *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. pp. 543, 544; 78 L. J. Ch. 1.

(*i*) *Coats* v. *Clarence Railway Co.*, 1 Russ. & M. 181; 8 L. J. Ch. 72; 32 R. R. 183; and see *Manser* v. *Northern and Eastern Railway Co.*, 2 Ra. Ca. 380; *Stainton* v. *Woolrych*, 23 B. p. 234; 26 L. J. Ch. 300; 113 R. R. 111; *Roberts* v. *Charing Cross, Euston, and Hampstead Railway*, (1903) 87 L. T. 732.

(*k*) 8 & 9 Vict. c. 20.

(*l*) *Reg.* v. *East and West India Docks Railway Co.*, 2 E. & B. pp. 466, 474; 22 L. J. Q. B. 380; *Fenwick* v. *East London Railway Co.*, 20 Eq. 549; 44 L. J. Ch. 604. And see the Electric Lighting (Clauses) Act, 62 & 63 Vict. c. 19, sched. clause 81, which provides that "nothing in the special order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused or permitted by them."

As long as a company keep within their statutory powers, no action can be maintained against them for any act done in the exercise of their statutory authority, however injurious it may be to the property of others, provided the injury done is the necessary and inevitable result of the exercise of the statutory powers, and provided the works have been executed with proper skill and care, and in such a way as to cause no unnecessary injury to private rights (*m*). It is clearly settled that the power to take defined lands compulsorily and to make a line of railway thereon, and to use locomotives upon that line, entitles a railway company to run locomotives thereon, notwithstanding that in so doing they are causing what in the absence of such powers would be an actionable nuisance; and persons whose properties are injured by vibration, sparks, noise, or smoke incident to the proper use and working of the railway, cannot bring an action for nuisance (*n*). But by a recent Act (*o*) railway companies are now liable to make

(*m*) *Hammersmith Railway Co.* v. *Brand*, L. R. 4 H. L. p. 196; 38 L. J. Q. B. 265; *East Fremantle Corporation* v. *Annois*, (1902) A. C. p. 218; 71 L. J. P. C. 39; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, (1902) A. C. 381; 71 L. J. P. C. 122; *Canadian Pacific Railway Co.* v. *Roy*, (1902) A. C. 220; 71 L. J. P. C. 51; *Roberts* v. *Charing Cross, Euston and Hampstead Railway Co.*, (1903) 87 L. T. 732; *Ash* v. *Great Northern, Piccadilly and Brompton Railway Co.*, (1903) 19 T. L. R. 639; *Westminster Corporation* v. *London and North Western Railway Co.*, (1905) A. C. pp. 427, 430; 74 L. J. Ch. 629; *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. 526; 78 L. J. Ch. 1; *Horton* v. *Colwyn Bay Urban Council*, (1908) 1 K. B. p. 334; 77 L. J. K. B. 215; *West* v. *Bristol Tramways Co.*, (1908) 2 K. B. pp. 21, 22; 77 L. J. K. B. 684; *McClelland* v. *Manchester Corporation*, (1912) 1 K. B. p. 129; 81 L. J. K. B. p. 104.

(*n*) *Hammersmith Railway Co.* v. *Brand*; *East Fremantle Corporation* v. *Annois*, *supra*; *Jones* v. *Stanstead Railway Co.*, L. R. 4 P. C. 117; 41 L. J. P. C. 19; *London, Brighton and South Coast Railway Co.* v. *Truman*, 11 A. C. 45; 55 L. J. Ch. 354; *Att.-Gen.* v. *Metropolitan Railway Co.*, (1894) 1 Q. B. 384; 42 W. R. 381; *Harrison* v. *Southwark, etc., Water Co.*, (1891) 2 Ch. 409; 60 L. J. Ch. 630; *Canadian Pacific Railway Co.* v. *Roy*, (1902) A. C. 220; 71 L. J. P. C. 51. As to smoke from engines, see sect. 114, Railways Clauses Act, 1845; sect. 19, Regulation of Railways Act, 1868, and *London County Council* v. *Great Eastern Railway Co.*, (1906) 2 K. B. 312; 75 L. J. K. B. 490. As to liability of owner for fire caused by his traction engine using highway, see *Gunter* v. *James*, (1908) 24 T. L. R. 868.

(*o*) Railway Fires Act, 1905 (5 Edw. 7, c. 11), sect. 1. By sect.

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Fires caused by locomotives.

Nuisance caused by exercise of statutory powers.

good damage to agricultural lands or crops caused by sparks from their engines, notwithstanding that the engines are being used under their statutory powers.

Where a company causes a nuisance by the exercise of powers in pursuance of a Provisional Order of the Board of Trade, it is protected in the like manner as in the case of the exercise of other statutory powers (*p*).

Where a thing may be done under statutory powers in one of two ways, one of which is injurious to private rights, and the other is not, it must as a rule be done in a manner which will not be injurious (*q*). Where a company was authorised to pave certain roads with wood paving, and used blocks coated with creosote, the fumes from which injured the plaintiff's plants, the company were held liable to the plaintiff for the injury which he had sustained, although they did not know that the use of creosoted wood might cause damage, and although they had not been guilty of negligence, on the ground that they were not authorised by their Act to use this particular kind of paving (*r*). But where a company is expressly given by their Act power to carry out certain works by alternative methods, they are entitled to adopt whichever method they consider the better and will not be liable for injury resulting to a third party from having carried out their works in such manner (*s*).

Where a statute or Provisional Order expressly confers a power but adds a proviso that no nuisance must be created, it

1 (3) the claim for damage is limited to 100*l.*, and by sect. 3 notice of claim has to be sent to the company within a limited time. See *Martin* v. *Great Eastern Railway Co.*, (1912) 2 K. B. 406; 81 L. J. K. B. 825.

(*p*) *National Telephone Co.* v. *Baker*, (1893) 2 Ch. 186; 62 L. J. Ch. 699.

(*q*) *Fenwick* v. *East London Railway Co.*, 20 Eq. 544; 44 L. J. Ch 692; *Norton* v. *London and North Western Railway Co.*, 9 C. D. p. 633; 47 L. J. Ch. 859; *Ogston* v. *Aberdeen District Tramways Co.*, (1897) A. C. p. 119; 66 L. J. P. C. 1; see *Westminster Corporation* v. *London and North Western Railway Co.*, (1905) A. C. p. 433; 74 L. J. Ch. 629; *West* v. *Bristol Tramways Co.*, (1908) 2 K. B. 14; 77 L. J. K. B. 684.

(*r*) *West* v. *Bristol Tramways Co.*, *supra*.

(*s*) *Dumphy* v. *Montreal Light Co.*, (1907) A. C. 454; 76 L. J. P. C. 71: and see *McClelland* v. *Manchester Corporation*, (1912) 1 K. B. p. 130; 81 L. J. K. B. p. 104.

is no defence to say that the work cannot be done without creating a nuisance (*t*), and if statutory powers are conferred under circumstances in which the powers may be exercised without in themselves causing a nuisance, and new and unforeseen circumstances render the exercise of the powers impossible without a breach of the law, these powers cannot be exercised without making the parties liable (*u*). If, however, the Act necessarily requires something to be done which cannot be done without creating a nuisance, or if, as to those things which may or may not be done under it, there is evidence on the face of the Act that the legislature supposed it impossible to be done somewhere and under some circumstances without creating a nuisance, an action will not lie (*x*). Where, however, the terms of a statute are not imperative, but only permissive, and it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put in execution or not, the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose (*y*). In other words, where the statutory power is permissive and not imperative, the legislature must be held to have intended that its exercise is not to be in prejudice of the common law rights of others (*z*). The presumption is that a public body, whether

(*t*) See *Jordeson* v. *Sutton, etc., Gas Co.*, (1898) 2 Ch. 614; 67 L. J. Ch. 666; (1899) 2 Ch. 218; 68 L. J. Ch. 457; *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. 707; 73 L. J. Ch. 275; *Midwood* v. *Manchester Corporation*, (1905) 2 K. B. 597; 74 L. J. K. B. 884; *Att.-Gen.* v. *Dorchester Corporation*, (1906) 70 J. P. 281; *Demerara Electric Lighting Co.* v. *White*, (1907) A. C. 330; 76 L. J. P. C. 54; *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. p. 544; 78 L. J. Ch. 1.

(*u*) *Queen* v. *Bradford Navigation Co.*, 6 B. & S. 631; 34 L. J. Q. B. 191.

(*x*) *Metropolitan District Asylum* v. *Hill*, 6 A. C. 193; 50 L. J. Q. B. 253; and see *Price's Patent Candle Co.* v. *London County Council*, *supra*.

(*y*) *Metropolitan District Asylum* v. *Hill*, 6 A. C. 193; 50 L. J. Q. B. 353; *Canadian Pacific Railway Co.* v. *Parke*, (1899) A. C. 535, 545; 68 L. J. P. C. 89; *Metropolitan Water Board* v. *Solomon*, (1908) 2 Ch. 214 220; 77 L. J. Ch. 517; *McClelland* v. *Manchester Corporation*, (1912) 1 K. B. pp. 130, 131; 81 L. J. K. B. pp. 104, 105.

(*z*) *Canadian Pacific Railway Co.* v. *Parke*, (1899) A. C. p. 545; 68 L. J. P. C. 89; *Metropolitan*

a trading body or not, is not authorised to create a nuisance or otherwise affect private rights unless compensation is provided, but this presumption must yield where the language of the statute is sufficiently clear to authorise the nuisance without compensation (*a*). The burden lies on those who seek to establish that the legislature intended to take away the private right of individuals to show that by express words, or by necessary implication, such an intention appears (*b*).

In *Gas Light and Coke Co.* v. *Vestry of St. Mary Abbots, Kensington* (*c*), the plaintiffs, a gas company, laid down pipes under the surface of certain streets, as they were bound by statute to do, for the purpose of supplying gas to light the street and houses in the street. The streets were vested in the defendants, the vestry of the parish, by certain statutes which gave them the authority of the surveyor of highways with the duty to repair, but without prescribing any particular mode of repair. The defendants used steam rollers for the repair of the streets, as being a mode of repair most advantageous to both the ratepayers and the public, but the rollers used were so heavy as to frequently injure the plaintiffs' pipes, though the pipes were sufficiently below the surface as not to have been injured by the ordinary mode of repair, if such rollers had not been used. It was held that the plaintiffs were entitled not only to recover damages for the injury which had been done, but also to have an injunction to restrain the defendants from using steam rollers in such a way as to injure the pipes of the plaintiffs.

"The authorities show," said the Court (*d*), "that an action lies for an injury to property unless such injury is expressly

Water Board v. *Solomon*, (1908) 2 Ch. p. 220.

(*a*) *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. pp. 543, 544; 78 L. J. Ch. 1.

(*b*) *Metropolitan District Asylum* v. *Hill*, 6 A. C. 193; 50 L. J. Q. B. 153; *Att.-Gen.* v. *Dorchester Corporation*, (1906) 94 L. T. p. 688; *Metropolitan Water Board* v. *Solomon*, (1908) 2 Ch. p. 220; 77 L. J. Ch. 517.

(*c*) 15 Q. B. D. 1; 54 L. J. Q. B. 414; see *Att.-Gen.* v. *Scott*, (1904) 1 K. B. 404; 73 L. J. K. B. 196; (1905) 2 K. B. 160; 74 L. J. K. B. 803; *Corporation of Chichester* v. *Foster*, (1906) 1 K. B. 167; 75 L. J. K. B. 33.

(*d*) 15 Q. B. D. p. 5; 54 L. J. Q. B. p. 418.

authorised by statute or is physically speaking the necessary consequence of what is so authorised. If in this case the defendants were expressly authorised by statute to use steam rollers of such a weight as necessarily to injure the plaintiff's pipes, the plaintiff would have no ground of complaint. The case would be one of *damnum absque injuria*. The same consequences would follow if the defendants were expressly authorised by statute to repair in some way which necessarily required the use of heavy steam rollers or other machinery which could not be worked without injuring the plaintiffs' pipes, there again, although such rollers or machinery were not expressly mentioned, their use would be authorised by necessary implication and the plaintiffs would be without redress. But unless some such statutory enactment can be shown to authorise the defendants to injure the plaintiffs' pipes, the plaintiffs are entitled to redress."

Accordingly, where a tramway company who were authorised by their Act to pave a road with wood paving, used for the purpose wood blocks coated with creosote, and the fumes from the creosote injured the plaintiff's shrubs, the company were held liable to the plaintiff for the damage which he had sustained, although they did not know that the use of creosoted wood might cause damage, and although they had not been guilty of negligence, on the ground that they were not authorised by their Act to use this particular kind of wood paving (*e*).

Onus of proof.

The burden of proving that the creation of a nuisance will be the inevitable result of carrying out the direction of the legislature lies on the persons seeking to justify the nuisance. If the order of the legislature can be carried out without nuisance, they cannot plead the protection of the statute; and on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance unless they are also able to show that the legislature has directed it to be done (*f*).

(*e*) *West* v. *Bristol Tramways Co.*, (1908) 2 K. B. 14; 77 L. J. K. B. 684.

(*f*) *Metropolitan Asylum District* v. *Hill*, 6 A. C. 193, 213; 50 L. J. Q. B. 353. See *Sellors* v. *Matlock Local Board of Health*, 14 Q. B. D. 929; and *East Fremantle Cor-*

Compensation.

Where injury to private rights results from the construction of works which have been authorised by statute and which have been executed with proper skill and care, the party injured must look for his remedy to the proviso for compensation, if any, within the statute which authorises the works (*g*).

Right to compensation assignable.

The claim to compensation under s. 68 of the Lands Clauses Consolidation Act, 1845, is not a claim to damages for a wrongful act, but is a claim to a right to compensation for damage which might be done in the lawful exercise of powers conferred on a corporation by the legislature, and such a claim is capable of assignment (*h*).

Where no provision for compensation in the statute.

If there be no provision for compensation in the statute, the party injured is without a remedy (*i*), but an intention to take away or injure property without making compensation should not be imputed to the legislature unless it be expressed in the statute in unequivocal terms (*k*).

The statutory tribunal, however, is only established to give compensation for losses sustained in consequence of what the incorporated company may do lawfully under the powers which the legislature has conferred on them. For anything done in excess of those powers, or contrary to what the legislature in conferring those powers has commanded, the proper remedy is by action (*l*).

poration v. *Annois*, (1902) A. C. p. 218; 71 L. J. P. C. 39.

(*g*) *Hammersmith Railway Co.* v. *Brand*, L. R. 4 H. L. 171; 38 L. J. Q. B. 265; *Kirby* v. *School Board for Harrogate*, (1896) 1 Ch. 437; 65 L. J. Ch. 736; *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *Anderson*, (1898) 2 Ch. 394; 67 L. J. Ch. 568; *Jordeson* v. *Sutton, etc., Gas Co.*, (1898) 2 Ch. p. 621; 67 L. J. Ch. 666; (1899) 2 Ch. p. 257; 68 L. J. Ch. 457; *Long Eaton Recreation Grounds Co.* v. *Midland Railway Co.*, (1902) 2 K. B. 574; 71 L. J. K. B. 837; *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. at pp 543, 544; 78 L. J. Ch. 1; *Piggott* v. *Middlesex County Council*, (1909) 1 Ch. pp. 143, 145; 77 L. J. Ch. 813.

(*h*) *Dawson* v. *Great Northern and City Railway Co.*, (1905) 1 K. B. 260; 73 L. J. K. B. 174.

(*i*) *Hammersmith Railway Co.* v. *Brand*, L. R. 4 H. L. p. 202; 38 L. J. Q. B. 265; *Att.-Gen.* v. *Metropolitan Railway Co.*, (1894) 1 Q. B. 384; 42 W. R. 381; *Roberts* v. *Charing Cross, Euston, and Hampstead Railway*, (1903) 87 L. T. p. 734.

(*k*) *The Commissioners of Public Works (Cape Colony)* v. *Logan*, (1903) A. C. 355; 72 L. J. P. C. 91.

(*l*) *Caledonian Railway Co.* v. *Colt*, 3 Macq. 833; *Reg.* v. *Darlington Board of Health*, 6 B. & S. 562; 35 L. J. Q. B. 45; *Imperial Gas Co.*

Compensation need not be tendered before commencement of works.

A public company, when acting in conformity with its statutory powers, need not, before commencing works which may injuriously affect lands, make or tender compensation for the conjectural damage (*m*).

Landowner not bound to prove damage before seeking compensation under the 68th section.

By the 68th section of the Lands Clauses Act, 8 & 9 Vict. c. 18, it is provided that if any party shall be entitled to compensation in respect of any lands or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the undertakers shall not have made compensation, it shall be assessed in the manner therein mentioned. The Court will not restrain by injunction proceedings for an assessment of compensation under the Act, but will leave the question of the right to compensation to be decided in an action on the award (*n*). If, however, there is an original equity affecting the claim, the Court will interfere. "Where there is an original equity affecting the claim," said Turner, L.J., in *Duke of Norfolk* v. *Tennant* (*o*), "the statute does not take it away. It is, I think, as much the duty of this Court to interpose by injunction in such cases as in the ordinary attempt to put in force the powers of the Act for compulsory purchase, where the purchase has been the subject of contract." Where accordingly there had been some treaty for compensation for damage with a landowner which had not been completed or carried out, but there was evidence to show that he had received consideration for an agreement which he refused to perfect, the Court restrained him from taking proceedings to obtain compensation under the section (*p*).

But if there is an original equity affecting the claim, the statute does not take it away.

v. *Broadbent*, 7 De G. M. & G. 459; 7 H. L. C. 600; 29 L. J. Ch. 377; and see *Piggott* v. *Middlesex County Council*, (1909) 1 Ch. p. 145; 77 L. J. Ch. 813.

(*m*) *Hutton* v. *London and South Western Railway Co.*, 7 Ha. 259; 18 L. J. Ch. 345; 82 R. R. 99; *Macey* v. *Metropolitan Board of Works*, 33 L. J. Ch. 377; see *Clark* v. *School Board of London*, 7 Ch. 120; 43 L. J. Ch. 121.

(*n*) *East and West India Docks* v. *Gattke*, 3 Mac. & G. 155; 87 R. R. 49; *London and Blackwall Railway Co.* v. *Cross*, 31 C. D. p. 367; 55 L. J. Ch. 313; *Brierley Hill Local Board* v. *Pearsall*, 11 Q. B. D. 735; 9 A. C. 595; 54 L. J. Q. B. 25.

(*o*) 9 Ha. p. 748.

(*p*) *Duke of Norfolk* v. *Tennant*, 9 Ha. 745; 89 R. R. 648. See *London and South Western Railway Co.* v. *Coward*, 5 Ha. Ca. 715;

Nuisance by public bodies.

The principles upon which the Court proceeds in restraining nuisance on the part of incorporated companies are also applicable to nuisance on the part of public bodies incorporated by Act of Parliament for a public purpose and for the promotion of the benefit of the community (*q*). Inasmuch as these bodies are acting on behalf of the public interest, the Court is disposed to assume that what they do, provided it be within the statutory powers, is a fair exercise of the discretion which has been reposed in them by the legislature (*r*), and will not interfere with them in the exercise of the powers given to them by statute so long as they do not conduct themselves in an arbitrary or oppressive manner, and do not appear to be actuated by corrupt or improper motives (*s*). But in the absence of an express power to create a nuisance, a public body executing drainage or other works for the benefit of their district are bound to exercise their powers so as not to create a nuisance (*t*), and where a statute

Maunsell v. *Midland Great Western of Ireland Railway Co.*, 1 H. & M. 130; 32 L. J. Ch. 513.

(*q*) *Frewin* v. *Lewis*, 4 M. & C. 249; 48 R. R. 88; *Att.-Gen.* v. *Bishop of Manchester*, L. R. 3 Eq. p. 455; see *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. pp. 543, 544; 78 L. J. Ch. 1.

(*r*) See *Foster* v. *Hornsby*, 2 Ir. Ch. 445; *Crossman* v. *Bristol and South Wales Railway Co.*, 1 H. & M. p. 542; *Att.-Gen.* v. *Great Eastern Railway Co.*, 6 Ch. p. 576. See *Westminster Corporation* v. *London and North Western Railway Co.*, (1905) A. C. 432; 74 L. J. Ch. 629.

(*s*) *Stainton* v. *Woolrych*, 23 Beav. 225; 26 L. J. Ch. 300; 113 R. R. 111; *Att.-Gen.* v. *Metropolitan Board of Works*, 1 H. & M. p. 315; *Stockton and Darlington Railway Co.* v. *Brown*, 9 H. L. C. p. 256; *Biddulph* v. *St. George's Vestry*, 3 D. J. & S. 493; 33 L. J. Ch. 411; *Westminster Corporation* v. *London and North Western Railway Co.*, *supra*: and see *Davis* v. *Bromley Corporation*, (1908) 1 K. B. 170; 77 L. J. K. B. 51.

(*t*) *Att.-Gen.* v. *Leeds Corporation*, 5 Ch. 583; 39 L. J. Ch. 711; *Att.-Gen.* v. *Colney Hatch Asylum*, 4 Ch. 146; 38 L. J. Ch. 265; *Att.-Gen.* v. *Gaslight and Coke Co.*, 7 C. D. 217; 47 L. J. Ch. 534; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. 287; 64 L. J. Ch. 216; *Jordeson* v. *Sutton, etc., Gas Co.*, (1899) 2 Ch. 217; 68 L. J. Ch. 457; *Roberts* v. *Charing Cross, Euston, and Hampstead Railway Co.*, (1903) 87 L. T. 732; *Midwood & Co.* v. *Manchester Corporation*, (1905); 2 K. B. p. 606; 74 L. J. K. B. 884; *Tilling & Co.* v. *Dick, Kerr & Co.*, (1905) 1 K. B. 562; 74 L. J. K. B. 359; *Att.-Gen.* v. *Dorchester Corporation*, (1906) 70 J. P. 281; *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. 543, 544; 78 L. J. Ch. 1.

or Provisional Order expressly confers a power to carry out certain works with a proviso that no nuisance must be created, it is no defence to say that the work cannot be done without causing a nuisance (*u*). The fact that a large population may suffer unless the rights of an individual are invaded cannot be taken into consideration by the Court (*x*). Consideration of public welfare may, however, justify the suspension of an injunction upon terms, but do not justify the denial of relief to the person whose rights have been affected (*y*).

If a public body is transgressing the powers which have been conferred on it by the legislature, or is doing an illegal act which in its nature tends to the injury of the public, it is not necessary on information by the Attorney-General to prove that injury to the public will result from the act complained of (*z*).

Where statute infringed, evidence of injury to public need not be proved by Attorney-General.

In a recent case, a railway company was by its Act, which incorporated the Railways Clauses Act, 1845, empowered to carry the railway across a turnpike road on the level. The company constantly drove trains over the level crossing at a speed exceeding four miles an hour in breach of the provisions of sect. 48 of the Railways Clauses Act. On an information filed by the Attorney-General the company set up as a defence that there was no proof of any injury occasioned to the public by the company's non-observance of the provisions in question, and that the inconvenience caused to the public by the existence of the level crossing would be increased if the company complied with sect. 48 of the Railways Clauses Act. It was there held, however, that the information being

(*u*) *Midwood & Co.* v. *Manchester Corporation, Price's Patent Candle Co.* v. *London County Council, supra.*

(*x*) *Att.-Gen.* v. *Borough of Birmingham*, 4 K. & J. 528; 116 R. R. 445; *Att.-Gen.* v. *Colney Hatch Asylum*, 4 Ch. pp. 154, 155; 38 L. J. Ch. 265; *Gibbings* v. *Hungerford*, (1904) 1 Ir. R. 211, 228; cf. *Raphael* v. *Thames Valley Railway Co.*, 2 Ch. 147; 36 L. J. Ch. 209.

(*y*) *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. 544; 78 L. J. Ch. 1.

(*z*) *Att.-Gen.* v. *Cockermouth Local Board*, 18 Eq. 172; 44 L. J. Ch. 118; *Att.-Gen.* v. *Shrewsbury Bridge Co.*, 21 C. D. 752; 51 L. J. Ch. 746; *Att.-Gen.* v. *London and North Western Railway Co.*, (1899) 1 Q. B. 72; 68 L. J. Q. B. 4; (1900) 1 Q. B. 78; 69 L. J. Q. B. 26.

filed by the Attorney-General to enforce the express provisions of a statute, the Court could not entertain the question of whether injury to the public was in fact occasioned by the non-compliance with the statute, and that the injunction must therefore be granted (*a*). The Attorney-General however is not entitled to an injunction as a matter of right in every case where a public body is committing a breach of a statute, for the Court has a discretion in the case of actions by the Attorney-General as well as in other actions (*b*).

Attorney-General not entitled to injunction as a matter of right.

Where a plaintiff has proved his right to an injunction against a nuisance, it is no part of the duty of the Court to inquire in what manner the defendant can best remove it. The plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible; and it is the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to (*c*). But where the difficulty of removing the injury is great, the Court will suspend the operation of an injunction for a time, with liberty to the defendant to apply for an extension of time (*d*).

Suspension of injunction.

The Court will not make an order against a public body or against an individual to do an act, unless it is satisfied that it is within their or his power to do it (*e*).

The duty of a local authority under sect. 15 of the Public

(*a*) *Att.-Gen.* v. *London and North Western Railway Co.*, (1899) 1 Q. B. 72; 68 L. J. Q. B. 4; (1900) 1 Q. B. 78; 69 L. J. Q. B. 26.

(*b*) *Att.-Gen.* v. *Wimbledon House Estate Co.*, (1904) 2 Ch. p. 42; 73 L. J. Ch. 593; *Att.-Gen.* v. *Grand Junction Canal Co.*, (1909) 2 Ch. pp. 517, 518; 78 L. J. Ch. 521; *Att.-Gen.* v. *Birmingham, Tame, etc., District Board*, (1910) 1 Ch. 48, pp. 53, 69; 79 L. J. Ch. 137; (1912) A. C. 788, 812; (1913) 82 L. J. Ch. 45.

(*c*) *Att.-Gen.* v. *Colney Hatch Asylum*, 4 Ch. 146, 154; 38 L. J. Ch. 265.

(*d*) *Att.-Gen.* v. *Colney Hatch Asylum*, 4 Ch. 154; 38 L. J. Ch. 265; *Islington Vestry* v. *Hornsey District Council*, (1900) 1 Ch. 706, 707; *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. p. 544; 78 L. J. Ch. 1; *Owen* v. *Faversham Corporation*, (1908) 72 J. P. 404; *Att.-Gen.* v. *Birmingham, Tame, etc., District Board*, (1910) 1 Ch. 62; 79 L. J. Ch. 137; (1912) A. C. 788; (1913) 82 L. J. Ch. 45; and see *Att.-Gen.* v. *Gibb*, (1909) 2 Ch. at pp. 278, 279; 78 L. J. Ch. 521; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. 393, 411; 80 L. J. Ch. p. 154.

(*e*) *Att.-Gen.* v. *Guardians of Dorking*, 20 C. D. 606, 607; 51 L. J.

Health Act, 1875, to make such sewers as may be necessary for effectually draining their district, cannot be enforced by an aggrieved individual by action, the only remedy for the neglect by the local authority of their duty, being by complaint to the Local Government Board under sect. 299 of the Act (*f*). But the remedy given by sect. 299 in the case of a local authority neglecting to provide sufficient sewers, does not preclude an individual whose property has been injured, from obtaining an injunction and damages against a local authority in respect of a nuisance caused by their neglect to perform the duty imposed upon them by sect. 19 of the Act, to keep their sewers in such a condition as not to be a nuisance (*g*).

Neglect by local authority to provide effective sewers.

Liability for nuisance.

A local authority has not, in the absence of express enactment or agreement, any higher right than an individual landowner to discharge sewage into the sewers belonging to the sanitary authority of another district (*h*). But a local authority may discharge surface water into a natural stream or watercourse, or canal on land belonging to another person within their district (*i*). Any damage caused by the proper exercise of such right is a matter for compensation and forms no ground for an injunction (*k*).

Discharge of sewage by local authority into sewers of adjoining district.

Watercourse.

The provisions of the Metropolis Management Act, 25 & 26 Vict. c. 102, s. 106 (*l*), and the Public Health Act, 1875, s. 264 (*l*), requiring one month's notice to be served before

Notice of proceedings under Metropolis Management Act, 1855, and Public Health Act, 1875.

Ch. 585, *per* Jessel, M.R.; *Att.-Gen.* v. *Colney Hatch Asylum*, 4 Ch. p. 154; 38 L. J. Ch. 265; *Evans* v. *Manchester, etc., Railway Co.*, 36 C. D. p. 639; 57 L. J. Ch. 153; *Harrington* (*Earl*) v. *Derby Corporation*, (1905) 1 Ch. p. 220; 74 L. J. Ch. 219.

(*f*) *Pasmore* v. *Oswaldtwistle Urban Council*, (1898) A. C. 387; 67 L. J. Q. B. 635.

(*g*) *Baron* v. *Portslade-by-Sea Urban Council*, (1900) 2 Q. B. 588; 69 L. J. Q. B. 899; *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 501; (1912) 81 L. J. Ch. 40.

(*h*) *Att.-Gen.* v. *Acton Local Board*, 22 C. D. 221; 52 L. J. Ch. 108; and see *Islington Vestry* v. *Hornsey Council*, (1900) 1 Ch. 695.

(*i*) *Durrant* v. *Branksome Urban Council*, (1897) 2 Ch. 291; 66 L. J. Ch. 653, and see *Croysdale* v. *Sunbury-on-Thames Urban Council*, (1898) 2 Ch. 515, 520; 67 L. J. Ch. 585.

(*k*) *Durrant* v. *Branksome Urban Council*, (1897) 2 Ch. p. 305; 66 L. J. Ch. 585; *Croysdale* v. *Sunbury-on-Thames Urban Council*, *supra*.

(*l*) Repealed by the Public Authorities Protection Act, 1893.

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instituting proceedings, were held not to apply where the principal object of the action was to obtain an injunction to restrain an immediate injury (*m*). Where an action was *bonâ fide* brought to obtain an injunction against a sanitary authority, and at the trial the Court considered that an injunction was not then needed, it was held that there was jurisdiction to award damages in lieu of an injunction, in spite of the fact that the notice of action required by sect. 264 of the Public Health Act, 1875, had not been given (*n*). It is now, however, provided by the Public Authorities Act, 1893 (*o*), that where any action or other proceeding is commenced against any person for an act done in execution of any Act of Parliament, or of any public duty or authority, or in respect of any default in the execution of any such Act, duty, or authority, the action or proceeding shall not lie unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage (*p*), within six months next after the ceasing thereof (*q*), and the provisions of any public general Acts requiring proceedings to be commenced within any particular time or notice of action to be given are repealed (*r*). The word "action" as used in this Act includes all actions in the Chancery Division, whether actions for an injunction or declaration, or actions partly for an injunction, or declaration, and

Public Authorities Protection Act, 1893.

(*m*) *Flower* v. *Low Leyton Local Board*, 5 C. D. 347; 46 L. J. Ch. 621; *Att.-Gen.* v. *Hackney Board of Health*, 20 Eq. 626; 44 L. J. Ch. 545; *Sellors* v. *Matlock Local Board*, 14 Q. B. D. 929; *Bateman* v. *Poplar District Board*, 33 C. D. 361; 56 L. J. Ch. 149.

(*n*) *Chapman* v. *Auckland Union*, 23 Q. B. D. 294; 58 L. J. Q. B. 504.

(*o*) 56 & 57 Vict. c. 61, sect. 1 (a). As to costs where judgment is obtained by the defendant, and where a plaintiff has not given the defendant an opportunity of making amends before action, see sect 1 (b), (d).

(*p*) See *Harrington* (*Earl*) v. *Derby Corporation*, (1905) 1 Ch. 206; 74 L. J. Ch. 219; *Hague* v. *Doncaster Rural Council*, (1908) 100 L. T. 121; 25 T. L. R. 130; *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 495; (1912) 81 L. J. Ch. 40.

(*q*) See *Barnett* v. *Woolwich Borough Council*, (1910) 74 J. P. 441, and *Hewlett* v. *London County Council*, (1908) 24 T. L. R. 331, where the [illegible] was not issued within the six months owing to negotiations for a settlement.

(*r*) Sect. 2 (b), (c).

partly for damages, but not interlocutory applications or appeals (*s*).

Delay and acquiescence.

A person who comes to the Court for relief by interlocutory injunction against nuisance must show due diligence in making the application. Whatever may have been the original equity of his case, if he has by his conduct encouraged another to expend monies or alter his condition in contravention of the rights for which he contends, he has deprived himself of his equity to the interference of the Court (*t*). It is not sufficient in order to negative acquiescence to show that the plaintiff gave notice that he objected, and threatened proceedings (*u*). All the circumstances must be considered (*x*). Accordingly a man who had acquiesced for eighteen months in the deviation of part of a navigable river, and in the obstruction of a road by a railway company, was held precluded from relief (*y*). So also a man who did not file his bill until two years and a half after the works complained of as throwing flood-water over his lands were completed, was held precluded from relief (*z*). So also a man who had permitted the owner of the adjoining premises to rebuild them to a greater height than they were before, and to alter his ancient lights and to open new ones (the work being done under the inspection of the defendant's surveyor) was held not entitled to interrupt the lights after the work was completed (*a*).

If the question as to nuisance is one which admits of a determination prospectively, a man should not delay in coming

(*s*) *Harrop* v. *Orsett Corporation*, (1898) 1 Ch. 525; 67 L. J. Ch. 347; *Fielden* v. *Morley Corporation*, (1900) A. C. 133; 69 L. J. Ch. 314; *Ambler & Co.* v. *Bradford Corporation*, (1902) 2 Ch. 585; 71 L. J. Ch. 744.

(*t*) *Ante*, p. 21; and see *Parrott* v. *Palmer*, 3 M. & K. 640; 41 R. R. 149; *Wicks* v. *Hunt*, John. 380; *Johnson* v. *Wyatt*, 2 De G. J. & S. 18, 25; *Duke of Leeds* v. *Earl Amherst*, 2 Ph. 123; *Cotching* v. *Bassett*, 32 L. J. Ch. 286.

(*u*) *Wicks* v. *Hunt*, John. 372; 123 R. R. 127.

(*x*) *Bankart* v. *Houghton*, 27 Beav. 425; 28 L. J. Ch. 473; 122 R. R. 471.

(*y*) *Illingworth* v. *Manchester and Leeds Railway Co.*, 2 Ra. Ca. 188.

(*z*) *Wicks* v. *Hunt*, John. 380; 123 R. R. 127.

(*a*) *Cotching* v. *Bassett*, 32 Beav. 101; 32 L. J. Ch. 286. See *McManus* v. *Cooke*, 35 C. D. p. 696;

to the Court. If he abstains from coming until the mischief is actually done, he may be told he is too late (*b*). If the act complained of is caused by a public company in the execution and construction of their works, it is more incumbent on the party injured to apply without delay, than in ordinary cases (*c*). Much, however, depends on the nature and character of the nuisance.

Though a stronger case of delay is required to affect those who assert a public right, than when a private right alone is in dispute (*d*), delay, even in such cases, is not without effect (*e*). But the peculiar circumstances of the case may often account for and excuse the delay (*f*). In the case of a gradually increasing nuisance the Court will have regard to the nature of the nuisance, and conclude that the relators have been waiting to see whether the nuisance will continue to grow, or whether circumstances may not of themselves arise which will check or diminish it (*g*). If the public have been slow in complaining, their delay is a proper subject for the consideration of the Court in fixing the amount of time to be allowed for carrying the injunction into effect (*h*).

The principles of the Court with respect to delay and acquiescence applicable to the case of interlocutory injunctions apply also in the case of applications for "perpetual injunctions"; but to justify the Court in refusing to interfere at the trial of the action, there must be a much stronger case of delay and acquiescence than is sufficient to be a bar on

56 L. J. Ch. 662; and see *Davies* v. *Marshall*, 10 C. B. N. S. 703; 1 Dr. & Sm. 557.

(*b*) *Dawson* v. *Paver*, 5 Ha. 415, 430; 16 L. J. Ch. 274; 71 R. R. 155.

(*c*) *Ante*, p. 21. See *Piggott* v. *Middlesex County Council*, (1909) 1 Ch. p. 148; 77 L. J. Ch. p. 820.

(*d*) See *Islington Vestry* v. *Hornsey Urban Council*, (1900) 1 Ch. 695.

(*e*) *Att.-Gen.* v. *Johnson*, 2 Wils. C. C. 87, 102; 18 R. R. 156; *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. p. 311; 22 L. J. Ch. 811; *Islington Vestry* v. *Hornsey Urban Council*, *supra*.

(*f*) *Att.-Gen.* v. *Colney Hatch Asylum*, 4 Ch. 146, 160; 38 L. J. Ch. 265; *Att.-Gen.* v. *Leeds Corporation*, 5 Ch. p. 594; 39 L. J. Ch. 711.

(*g*) *Att.-Gen.* v. *Proprietors of Bradford Canal*, 2 Eq. 71; 31 L. J. Ch. 619; *Att.-Gen.* v. *Leeds Corporation*, *supra*.

(*h*) *Att.-Gen.* v. *Proprietors of Bradford Canal*, *Att.-Gen.* v. *Colney Hatch Asylum*, *supra*.

the interlocutory application—there must be fraud or such acquiescence as in the view of the Court would make it a fraud on the part of the plaintiff to insist on his legal right; and it seems that "mere delay" will not disentitle a plaintiff to an injunction in aid of the legal right, unless the claim to enforce the right is barred by the Statutes of Limitations (*i*). In the case of a continuing nuisance the Statutes of Limitations would appear not to have any application except as to the amount of damages which could be recovered (*k*).

Injunction does not run with the land.

An injunction being an order directed to a person does not run with the land (*l*). Where, therefore, after a perpetual injunction had been obtained against a sanitary authority restraining it from polluting a river, a Provisional Order was made constituting a new and larger drainage board, it was held that the persons who had obtained the injunction against the old sanitary authority could not enforce it against the new board. If the new drainage board continued the nuisance, or failed to take effectual steps to remedy it, a new action would have to be brought (*m*).

Court of Appeal as a rule unwilling to refer evidence to expert for report.

In cases of nuisance, unless it plainly appears that the conclusion of the Court below upon the evidence was wrong, the Court of Appeal is unwilling to re-open the investigation by directing an issue or employing experts to report (*n*).

Discharge of injunction by Court of Appeal on report of expert.

In a recent case (*o*), where an injunction had been granted restraining a district drainage board from discharging sewage into a river in contravention of sect. 17 of the Public Health Act, 1875, and the board had obtained successive adjournments of their appeal to complete certain works so as to comply with the section, and there was a conflict of evidence as to the sufficiency of the works which the board had carried out, the Court of Appeal referred the matter to an expert to

(*i*) *Ante*, pp. 36, 37.

(*k*) *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 411; 80 L. J. Ch. p. 154.

(*l*) *Ante*, p. 13.

(*m*) *Att.-Gen.* v. *Birmingham Drainage Board*, 17 C. D. 685; 50 L. J. Ch. 786; cf. *Taylor* v. *Friern Barnet Local Board*, (1885) W. N. 7.

(*n*) *Salvin* v. *North Brancepeth Coal Co.*, 9 Ch. 711, 715; 46 L. J. Ch. 149.

(*o*) *Att.-Gen.* v. *Birmingham, Tame, etc., District Drainage Board*, (1910) 1 Ch. 48; 79 L. J. Ch. 137; order of C. A. as varied by H. L., (1912) A. C. 788; 82 L. J. Ch. 45.

report, and, as his report was in favour of the board, discharged the injunction, the board undertaking to maintain the existing results of their works so as to prevent any future breach of the section, the plaintiffs having liberty to apply for an injunction in case of any breach of the undertaking.

SECTION 2.—NUISANCE TO DWELLING-HOUSES AND BUSINESS PREMISES.

When the Court will restrain a nuisance.

The foundation of the jurisdiction of the Court by injunction in the case of nuisance to dwelling-houses or business premises, is such a degree of injury to property as interferes materially with its comfort and enjoyment either for domestic purposes or business. If the house is a dwelling-house, the rule or standard of the amount of damage that calls for the exercise of the jurisdiction to grant preventive relief is the comfort and enjoyment in their abode to which the occupiers are reasonably entitled, and this must be estimated according to the plain and simple notions entertained by persons in ordinary life, and not according to those held by persons accustomed to elegant and dainty habits of living (*p*). If the house is a manufactory or place of business, the rule or standard is damage of such an amount as to render it to a material extent less suitable for the purposes of business (*q*).

In deciding whether a defendant's acts have materially interfered with the use and enjoyment of the plaintiff's dwelling-house or place of business according to the ordinary requirements of reasonable men, the Court will consider not

(*p*) *Jackson* v. *Duke of Newcastle*, 3 De G. J. & S. 275; 33 L. J. Ch. 698; *Kelk* v. *Pearson*, 6 Ch. p. 811; 19 W. R. 665; *Walter* v. *Selfe*, 4 De G. & S. p. 322; 20 L. J. Ch. 433; 87 R. R. 393; *Soltau* v. *De Held*, 2 Sim. N. S. p. 159; 21 L. J. Ch. 153; *Kine* v. *Jolly*, (1905) 1 Ch. p. 489; 74 L. J. Ch. 174; affirmed, *sub nom.*, *Jolly* v. *Kine*, (1907) A. C. 1; 76 L. J. Ch. 1; *Ambler* v. *Gordon*, (1905) 1 K. B. p. 424; 74 L. J. K. B. 185; *Rushmer* v. *Polsue Alfieri & Co.*, (1906) 1 Ch. pp. 236, 237; 75 L. J. Ch. 79; (1907) A. C. 121; 76 L. J. Ch. 365; *Adams* v. *Ursell*, (1913) 1 Ch. 269; 82 L. J. Ch. 157.

(*q*) *Jackson* v. *Duke of Newcastle*, *supra*; *City of London Brewery* v. *Tennant*, 9 Ch. p. 216; *Ecclesiastical Commissioners* v. *Kino*, 14 C. D. p. 228; 49 L. J. Ch. 529; *Colls* v. *Home and Colonial Stores*, (1904) A. C. pp. 185, 198; 73 L. J. Ch. 484.

merely the acts of the defendant, but also the nature of the trades usually carried on in the locality, and the noises and disturbances existing there prior to the acts of the defendant which are complained of; and if, after taking all these circumstances into consideration, the Court finds that there is a substantial interference with the comfortable use and enjoyment of the plaintiff's premises according to the ordinary requirements of mankind, the Court will grant relief (*r*).

Extent of right to light.

A nuisance which frequently calls for the interference of the Court is the setting up by a man of buildings on his land which obstruct the passage of light to his neighbour's windows. Apart from express contract or grant, the owner of a house has no right to any access of light to his windows over his neighbour's land until he has acquired the right by prescription at common law or under the Prescription Act, 2 & 3 Will. 4, c. 71. When he has acquired the right, he has a house with an easement of light attached to it (*s*), which easement belongs to the class known as negative easements, and is nothing more or less than the right to prevent the owner or occupier of an adjoining tenement from building or placing on his land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement (*t*).

Who may sue.

An action for an injunction to restrain the infringement of ancient lights may be brought by the occupier of the premises, whether he be tenant for a term of years (*u*), or from year to

Tenant.

(*r*) *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 650; 35 L. J. Q. B. 66; *Sturges* v. *Bridgman*, 11 C. D. p. 865; 48 L. J. Ch. 785; *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 185; 73 L. J. Ch. 484; *Higgins* v. *Betts*, (1905) 2 Ch. p. 216; 74 L. J. Ch. 621; *Kine* v. *Jolly*, (1905) 1 Ch. p. 493; affirmed, *sub nom. Jolly* v. *Kine*, (1907) A. C. 1; *Rushmer* v. *Polsue, Alfieri & Co.*, (1906) 1 Ch. pp. 236, 237; 75 L. J. Ch. 79; (1907) A. C. 121; 76 L. J. Ch. 365; and see *Heath* v. *Brighton Corporation*, (1908) 98 L. T. 718; 24 T. L. R. 414; *New Imperial Hotel Co.* v. *Johnson*, (1912) 1 I. R. 327; *Adams* v. *Ursell*, (1913) 1 Ch. 271; 82 L. J. Ch. 269.

(*s*) *Higgins* v. *Betts*, (1905) 2 Ch. p. 214; 74 L. J. Ch. 621.

(*t*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. pp. 185, 186; 73 L. J. Ch. 484; *Kine* v. *Jolly*, (1905) 1 Ch. p. 487; 74 L. J. Ch. 184; affirmed, *sub nom. Jolly* v. *Kine*, (1907) A. C. 1; 76 L. J. Ch. 1.

(*u*) See *Dent* v. *Auction Mart Co.*, L. R. 2 Eq. 238; 35 L. J. Ch. 555; *Colls* v. *Home and Colonial Stores*, (1904) A. C. 179; 73 L. J. Ch. 484; *Andrews* v. *Waite*, (1907) 2 Ch. 500; 76 L. J. Ch. 676.

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year (*x*), or a tenant whose lease has expired, but who has entered into an agreement for a new lease (*y*). An injunction granted to a tenant from year to year will, however, be limited to the period of the continuance of his tenancy (*z*).

Reversioner.

The reversioner may also sue, either alone or conjointly with his tenant (*a*), on the ground that the injury to the reversion is of a "permanent" nature (*b*). Where a house is occupied by a tenant, and the owner alone sues to restrain a nuisance, the Court will, as a rule, look for evidence from the tenant in support of his lessor's application for an injunction (*c*).

Difference between right to light and right to freedom from noise.

The difference between the right to light and the right to freedom from noise, is that the former right has to be acquired as an easement, in addition to the right to property, before it can be enforced, the latter right is *ab initio* incident to the right of property, but whichever right is interfered with, the wrong done is the same, namely, the disturbance of the owner in the enjoyment of his house (*d*).

When action lies for obstruction of ancient lights.

To constitute an illegal obstruction of light, it is not sufficient for a plaintiff to show that he has less light than he enjoyed previously, or that his premises cannot be used for all the purposes to which they might otherwise be applied, to maintain an action there must be a substantial interference with the plaintiff's comfortable or profitable occupation of his dwelling-house or business premises according to the ordinary notions of persons in the locality (*e*). The obstruc-

Obstruction must amount to a nuisance.

(*x*) *Simper* v. *Foley*, 2 J. & H. 555.

(*y*) *Gale* v. *Abbott*, 10 W. R. 748.

(*z*) *Simper* v. *Foley*, *supra*.

(*a*) See *Mercer* v. *Auction Mart Co.*, L. R. 2 Eq. 238; *Von Joel* v. *Hornsey*, (1895) 2 Ch. 774; 65 L. J. Ch. 102; *Cowper* v. *Laidley*, (1903) 2 Ch. 337; 72 L. J. Ch. 578; *Higgins* v. *Betts*, (1905) 2 Ch. 210; 74 L. J. Ch. 621.

(*b*) *Bower* v. *Hill*, 1 Bing. N. C. p. 555; *Mott* v. *Shoolbred*, 20 Eq. p. 24; 44 L. J. Ch. 380, *Cooper* v. *Crabtree* 20 C. D. 589; 51 L. J. Ch. 544; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 404; 80 L. J. Ch. 145.

(*c*) *Cleeve* v. *Mahany*, 9 W. R. 882. See *Radcliffe* v. *Duke of Portland*, 3 Giff. 702; *Curriers' Co.* v. *Corbett*, 4 De G. J. & S. p. 771; 13 W. R. 538.

(*d*) *Higgins* v. *Betts*, (1905) 2 Ch. p. 215; 74 L. J. Ch. 621.

(*e*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. 179; 73 L. J. Ch. 481; *Kine* v. *Jolly*, (1905) 1 Ch. pp. 489, 493; 74 L. J. Ch. 174; affirmed, *sub nom. Jolly* v. *Kine*,

tion of ancient lights is still, as it always has been, a question of nuisance or no nuisance (*f*), and the test of nuisance now is, not how much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had, but how much light is left, and is that sufficient for the comfortable use and enjoyment of the house according to the ordinary requirements of persons in the locality (*g*). In determining whether or not the quantity of light which the owner of the dominant tenement will continue to enjoy after the obstruction is sufficient, regard will be had to the light coming from other sources which the dominant owner is by grant or prescription entitled to receive (*h*).

Whether the obstruction of light is substantial enough for the interference of the Court is a question which must depend on the special circumstances of each case (*i*). The purpose for which the owner of the dominant tenement may desire to use his building in future does not either enlarge or diminish the easement which he has acquired. Thus an owner who uses a well-lighted room for a purpose which requires very little light, does not lose his right to use the same room for some other purpose for which more light is necessary, and the fact that an owner has obscured in a partial degree his own windows, does not deprive him of his right to restrain another person from diminishing the supply of light to which he is legally entitled (*k*). But where an owner of a

(1907) A. C. p. 2; 6 L. J. Ch. 1; *Ambler* v. *Gordon*, (1905) 1 K. B. p. 426; 74 L. J. K. B. 185; *Higgins* v. *Betts*, (1905) 2 Ch. pp. 214, 215; 74 L. J. Ch. 621; *Ankerson* v. *Connelly*, (1906) 2 Ch. p. 547; affirmed, (1907) 1 Ch. 678; 76 L. J. Ch. 402.

(*f*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 185; 73 L. J. Ch. 484; *Kine* v. *Jolly*, (1905) 1 Ch. p. 490; 74 L. J. Ch. 174; *Higgins* v. *Betts*, (1905) 2 Ch. p. 215; 74 L. J. Ch. 621; and see *Anderson* v. *Francis*, (1906) W. N. 160.

(*g*) *Higgins* v. *Betts*, (1905) 2 Ch. p. 215; 74 L. J. Ch. 621; and see *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 185; 73 L. J. Ch. 484; *Davis* v. *Marrable*, (1913) W. N. 208.

(*h*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 211; 73 L. J. Ch. 484; *Jolly* v. *Kine*, (1907) A. C. p. 7; 76 L. J. Ch. 1.

(*i*) *Kelk* v. *Pearson*, 6 Ch. p. 814; 24 L. T. 890; *Ecclesiastical Commissioners* v. *Kino*, 14 C. D. p. 225; 49 L. J. Ch. 529; *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 185; 73 L. J. Ch. 484; *Ambler* v. *Gordon*, (1905) 1 K. B. p. 422; 74 L. J. K. B. 185.

(*k*) *Baxter* v. *Bower*, 44 L. J. Ch.

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building containing ancient lights, in rebuilding his premises blocks out practically the whole of the light which his old building has been receiving, retaining only a small portion of the ancient apertures, the Court will not grant an injunction to restrain the owner of the servient tenement from obstructing the remaining small quantity of light which the new building receives, as the obstruction would not have been an actionable wrong in respect of the light coming to the old premises (*l*).

Effect of change in internal structure of house.

Although a dominant owner does not lose his easement of light by any change in the internal structure of his building, or by the use to which his building is put, and regard may be had, not only to the present use, but also to any ordinary use to which the tenement is adapted, it would seem that no right can be acquired to the enjoyment of light for some special or extraordinary purpose, even after twenty years' enjoyment to the knowledge of the owner of the servient tenement (*m*).

Light for special purpose.

The angle of 45 degrees.

In determining whether there has been a substantial interference with light, the Court has sometimes relied too much on the provisions as to 45 degrees contained in the Metropolis Management Act, 1862 (*n*). The provision as to 45 degrees in this Act was intended to deal with the width of streets, and was not intended to lay down any rule applicable to the light which a man is entitled to enjoy in the city of London. There is no conclusion of law that a building will not obstruct the light coming to a window, if it permits the light to fall on the window at an angle of not less than 45 degrees from the vertical. The question of the amount of obstruction is always a question of fact which depends on the evidence in each case (*o*). There is no rule of law that a man

825; *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 211; 73 L. J. Ch. 484; *Ankerson* v. *Connelly*, (1907) 1 Ch. p. 683; 76 L. J. Ch. 402.

(*l*) *Ankerson* v. *Connelly*, (1906) 2 Ch. 544; (1907) 1 Ch. 678; 76 L. J. Ch. 402.

(*m*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. pp. 202, 203; 73 L. J. Ch. 484; *Ambler* v. *Gordon*, (1905) 1 K. B. p. 417; 74 L. J. K. B. 185; *Browne* v. *Flower*, (1911) 1 Ch. p. 226; 80 L. J. Ch. 181.

(*n*) 25 & 26 Vict. c. 102, s. 85, repealed, but in substance re-enacted by the London Building Act, 1894, s. 49.

(*o*) *Ecclesiastical Commissioners* v. *Kino*, 14 C. D. p. 228; 49 L. J. Ch.

may build up to an angle of 45 degrees, but it is, generally speaking, a fair working rule to consider that no substantial injury is done to the owner of the dominant tenement, where an angle of 45 degrees is left to him, especially if there is good light coming from other directions as well, to which he has acquired a right by grant or prescription. Accordingly, in judging of the probable effect of a proposed building, the Court may not unreasonably regard the fact that an angle of 45 degrees will be left as *primâ facie* evidence that there will be no substantial interference and may require this presumption to be clearly rebutted by satisfactory evidence (*p*).

The Metropolitan Buildings Act, 1855, 18 & 19 Vict. c. 122, ss. 83, 85, which gave "a right to the building owner to raise any party structure permitted by this Act to be raised upon condition of making good all damage occasioned thereby to the adjoining premises," was held not to authorise the raising of a structure so as to obstruct ancient lights in the adjoining premises (*q*). This Act has been repealed, and in substance re-enacted by the London Building Act, 1894 (*r*), sect. 101 of which provides that "nothing in this Act shall authorise any interference with an easement of light, or other easements in or relating to a party wall."

London Building Act, 1894.

The shutting out of a pleasant prospect (*s*), the erection of disagreeable objects in view (*t*), or the invasion of a man's

No injunction for interference with prospect or view.

529; *Parker* v. *Avenue Hotel Co.*, 24 C. D. 282; *Colls* v. *Home and Colonial Stores*, (1904) A. C. pp. 204, 210; 73 L. J. Ch. 484; and see *Ambler* v. *Gordon*, (1905) 1 K. B. 422; 74 L. J. K. B. 185.

(*p*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. 210, 211; 73 L. J. Ch. 484.

(*q*) *Crofts* v. *Haldane*, L. R. 2 Q. B. 194; 36 L. J. Q. B. 85; *Bourke* v. *Alexander Hotel Co.*, 25 W. R. 393; (1877) W. N. 157.

(*r*) 57 & 58 Vict. c. ccxiii.

(*s*) *Aldred's case*, 9 Co. R. 58 a.; *Att.-Gen.* v. *Doughty*, 2 Ves. Sen. 453; see *Dalton* v. *Angus*, 6 A. C. 824; 50 L. J. Q. B. 689; and *Campbell* v. *Paddington Corporation*, (1911) 1 K. B. 869, 878; 80 L. J. K. B. 739.

(*t*) *Att.-Gen.* v. *Doughty*, 2 Ves. Sen. 453; *Potts* v. *Smith*, 6 Eq. p. 318; 38 L. J. Ch. 58. See *Roderick* v. *Aston Local Board of Health*, 5 C. D. 335; 46 L. J. Ch. 802, where it was held that a Local Board of Health might under the Public Health Act, 1875, erect a sewer above ground.

privacy by the opening of a window looking over his grounds (*u*), or by the erection of a staircase overlooking his bedrooms (*x*), give no right of action. Nor will the erection of buildings which prevent goods displayed in a shop from being seen from places where they would previously have been seen (*y*). But where a view or prospect from a house is interfered with by an act in itself unlawful, as by an erection on the highway, an action will lie by the owner or occupier of the house to recover any special damage sustained by reason of the wrongful act (*z*).

Unless caused by unlawful act.

Protection of legal right pending litigation.

If the right at law, and the invasion of that right be clear and free from doubt, and the case is not one for relief by damages, the Court may interfere at once and grant an injunction "*simpliciter*" (*a*), and in a serious case may make a mandatory order (*b*), but if either the right at law, or the fact of its violation is not free from doubt, the Court will have regard to the comparative convenience or inconvenience of granting or withholding the injunction (*c*). In such a case, if, on the balance of convenience and inconvenience, it appear that granting an injunction would be inflicting a great and disproportionate injury on the defendant, the motion will be ordered to stand over upon the defendant undertaking to alter the building or otherwise deal with it, as the Court shall direct, if the right at law should prove to be in favour of the plaintiff (*d*). If, on the other hand, the Court shall be of opinion that the balance of convenience is in favour of granting an injunction rather than of allowing the defendant to complete his building, with an undertaking to pull it down if

Balance of convenience.

(*u*) *Chandler* v. *Thompson*, 3 Camp. 80; 13 R. R. 756; *Turner* v. *Spooner*, 30 L. J. Ch. p. 803, and cf. *Re Penny and the South-Eastern Railway Co.*, 7 El. & Bl. 660; 26 L. J. Q. B. 225.

(*x*) *Browne* v. *Flower*, (1911) 1 Ch. 219; 80 L. J. Ch. 181.

(*y*) *Smith* v. *Owen*, 35 L. J. Ch. 317; (1866) W. N. 49; *Butt* v. *Imperial Gas Light Co.*, 2 Ch. 158; 15 W. R. 92.

(*z*) *Campbell* v. *Paddington Corporation*, (1911) 1 K. B. 869; 80 L. J. K. B. 739.

(*a*) *Potts* v. *Levy*, 2 Drew, 272.

(*b*) *Daniel* v. *Ferguson*, (1891) 2 Ch. 27; 39 W. R. 599; *Von Joel* v. *Hornsey*, (1895) 2 Ch. 774; 65 L. J. Ch. 102.

(*c*) See *ante*, pp. 26-29.

(*d*) *Smith* v. *Elyer*, 3 Jur. 790, *ante*, pp. 26-29.

required, an injunction will issue (*e*), the plaintiff giving the usual undertaking as to damages (*f*).

Appointment of surveyor.

It is not the practice of the Court on motion for an injunction to appoint a surveyor to report to the Court at the trial of the action as to whether the windows of the plaintiff have been in fact obscured by the buildings of the defendant (*g*). But if at the trial (or on motion for an injunction by consent treated as the trial) the Court finds difficulty in ascertaining from the evidence the amount of the injury, it will appoint a surveyor to make a report (*h*). In a case where the Court was not satisfied from the evidence whether the act proposed to be done by the defendant would or would not be a material obstruction to the plaintiff's light, the Court directed a temporary screen to be erected to the height of the proposed buildings and appointed a surveyor to report on the effect (*i*).

Injunction or damages.

Whether damages should be given in addition to, or in substitution for, an injunction in cases of obstruction of light, is a matter for the judicial discretion of the Court (*k*). When a plaintiff has established his legal right, and the fact of its infringement, he is *primâ facie* entitled to a perpetual injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case,

(*e*) *Newson* v. *Pender*, 27 C. D. 43; 33 W. R. 243.

(*f*) *Graham* v. *Campbell*, 7 C. D. p. 494; 47 L. J. Ch. 593; *Fenner* v. *Wilson*, (1893) 2 Ch. p. 658; 62 L. J. Ch. 984; *Att.-Gen.* v. *Albany Hotel Co.*, (1896) 2 Ch. p. 699; 65 L. J. Ch. 885; and see Practice Note, (1904) W. N. 203, 208, *Oberrheinische Metallwerke Co.* v. *Cocks*, (1906) W. N. 127, as to cross-undertaking in damages by a plaintiff when an undertaking is given to the Court by a defendant in lieu of an injunction.

(*g*) *Baltic Co.* v. *Simpson*, 24 W. R. 390.

(*h*) *Kelk* v. *Pearson*, 6 Ch. p. 810; 19 W. R. 665; *Abbott* v. *Holloway*, (1904) W. N. 124; *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 192; 73 L. J. Ch. p. 492. As to the power of the Court on the application of a party to order inspection of the property, see Order 50, r. 3. As to inspection by Judge, see Order 50, r. 4, and *Kine* v. *Jolly*, (1905) 1 Ch. p. 499; 74 L. J. Ch. 174.

(*i*) *Leech* v. *Schweder*, 9 Ch. 463; 43 L. J. Ch. 487.

(*k*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. pp. 192, 193; 73 L. J. Ch. 484; *Kine* v. *Jolly*, (1905) 1 Ch. pp. 495, 496, 504; 74 L. J. Ch. 174; affirmed, *sub nom.* *Jolly* v. *Kine*, (1907) A. C. 1; 76 L. J. Ch. 1.

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such as *laches*, or where the interference with the plaintiff's right is small, or can be fairly compensated by money (*l*). But if the injury cannot fairly be compensated by money, or if the defendant has acted in a high-handed manner, if he has endeavoured to steal a march upon the plaintiff, or to evade the jurisdiction of the Court, in such cases an injunction will be granted (*m*). But where there is really a question as to whether the obstruction is legal or not, and the defendant has acted fairly, the Court ought to incline to damages rather than to an injunction (*n*). The Court will, however, be careful not to allow an action for the protection of ancient lights to be used as a means of extorting money (*n*).

Measure of damages.

Where a plaintiff owned old and dilapidated houses which were likely to be demolished within a short time, and also owned the land at the back of his houses, which was suitable for building upon, and the defendant obstructed the plaintiff's ancient lights, the plaintiff was awarded by way of damages, not merely the depreciation in value of his houses, but the diminution in value of the whole of his property considered as a building site (*o*).

What passes by grant. Implied grant of lights.

It being a settled rule of construction that the grant of a principal thing shall be held by implication of law and without any express words to carry with it all that is reasonably necessary for the enjoyment of the thing granted for the purpose for which, according to the obvious intent of the parties, the grant was made (*p*), the right to light passes (independently of the Conveyancing Act, 1881, s. 6) upon the sale of a house

(*l*) *Martin* v. *Price*, (1894) 1 Ch. p. 284; 63 L. J. Ch. 209; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. p. 316; 64 L. J. Ch. 216; *Cowper* v. *Laidler*, (1903) 2 Ch. p. 341; 72 L. J. Ch. 578; *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 193; 73 L. J. Ch. p. 492; *Kine* v. *Jolly*, *supra*.

(*m*) *Shelfer* v. *City of London Electric Lighting Co.*, *Colls* v. *Home and Colonial Stores*, *Kine* v. *Jolly*, *supra*.

(*n*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 193; 73 L. J. Ch. 484; *Kine* v. *Jolly*, (1905) 1 Ch. p. 495; 74 L. J. Ch. 174.

(*o*) *Griffith* v. *Richard Clay & Co.*, (1912) 2 Ch. 291; 81 L. J. Ch. 809.

(*p*) *Pomfret* v. *Ricroft*, 1 Saund. 322 (*e*); *Hall* v. *Lund*, 1 H. & C. 676; *Wood* v. *Saunders*, 10 Ch. p. 584, affirming 44 L. J. Ch. 514; *Wheeldon* v. *Burrows*, 12 C. D. p. 49; 48 L. J. Ch. 853; *Browne* v. *Flower*, (1911) 1 Ch. p. 225; 80

by the grant itself, even without any special word of conveyance (*q*).

Grant of house, adjoining land retained.

Where, accordingly, the same person possessing a house having the actual use and enjoyment of certain lights, and also possessing the adjoining land, either conveys the house in fee simple or demises it for a term of years, neither he, nor any person claiming under him, can derogate from his grant by building on the adjoining land so as to obstruct or interrupt the enjoyment of the lights, although the lights be new (*r*). This rule of law (*s*), applies where the grants of the several parts of an estate take place not absolutely at the same moment, but so far at the same moment that they are to be considered as one transaction and done at the same time (*t*), and where two lessees derive interest under the same landlord (*u*). So also the rule applies where a house and the adjoining land are respectively devised to different persons by the same testator (*x*).

Simultaneous grant of house and land.

Derogation from grant.

When rule does not apply.

The rule will not, however, apply where the buildings are in an unfinished and skeleton state, and it is uncertain whether the openings which have been left in the walls are

L. J. Ch. 184. *See Lyttelton Times Co.* v. *Warner & Co.*, (1907) A. C. p. 481; 76 L. J. P. C. 100.

(*q*) See *Broomfield* v. *Williams*, (1897) 1 Ch. 602; 66 L. J. Ch. 305; *Godwin* v. *Schweppes & Co.*, (1902) 1 Ch. 926, 932; 71 L. J. Ch. 438; *Quicke* v. *Chapman*, (1903) 1 Ch. p. 666; 72 L. J. Ch. 373.

(*r*) *Kelk* v. *Pearson*, 6 Ch. p. 813; *Leech* v. *Schweder*, 9 Ch. p. 472; 43 L. J. Ch. 487; *Wheeldon* v. *Burrows*, 12 C. D. p. 49; 48 L. J. Ch. 853; *Myers* v. *Catterson*, 43 C. D. 470; 59 L. J. Ch. 315; *Aldin* v. *Latimer Clark & Co.*, (1894) 2 Ch. p. 437; 63 L. J. Ch. 601; *Broomfield* v. *Williams*, (1897) 1 Ch. p. 603; 66 L. J. Ch. 305; *Born* v. *Turner*, (1900) 2 Ch. p. 214; 69 L. J. Ch. 593. *Frederick Betts & Co.*, (1906) 2 Ch. 87; 75 L. J. Ch. 483; *Coble* v. *Bryant*, (1908) 1 Ch. 259; 77 L. J. Ch. 78; *Richardson* v. *Grohom*, (1908) 1 K. B. p. 42; *Browne* v. *Flower*, (1911) 1 Ch. pp. 225, 226; 80 L. J. Ch. 181.

(*s*) *Coble* v. *Bryant*, *supra*.

(*t*) *Swansborough* v. *Coventry*, 9 Bing. 305; 2 L. J. (N. S.) C. P. 11; 35 R. R. 660; *Allen* v. *Taylor*, 16 C. D. p. 358; 50 L. J. Ch. 178; *Russell* v. *Watts*, 10 A. C. p. 612; 55 L. J. Ch. 158; and see *Phillips* v. *Low*, (1892) 1 Ch. 47; 61 L. J. Ch. 44.

(*u*) *Contts* v. *Gorham*, Moo. & Malkin, 396; *Davies* v. *Marshall*, 1 Dr. & Sm. 557; 9 W. R. 368; *Warner* v. *McBryde*, 36 L. T. 360; *Cable* v. *Bryant*, (1908) 1 Ch. pp. 263, 264; 77 L. J. Ch. p. 81.

(*x*) *Phillips* v. *Low*, (1892) 1 Ch. 47; 61 L. J. Ch. 44; *Milner's Safe*

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intended for doors or windows (*y*). The rule of law that a man may not derogate from his grant (*z*) was held not to apply in favour of the plaintiff in a case where the owner of two pieces of land, on one of which houses had been built containing windows overlooking the other piece of land (which was vacant), contracted to sell the vacant piece of land to the defendant, and subsequently sold the houses to the plaintiff, although the conveyance to the plaintiff was executed before the conveyance to the defendant; inasmuch as at the date of the conveyance to the plaintiff the defendant and not the vendor was the beneficial owner in equity of the vacant piece of land (*a*).

So also the rule that a man may not derogate from his grant was held not to apply where the vendor had not, at the time of the grant, such an interest in the adjoining land as would have enabled him to grant an easement of light over it (*b*), as where he had merely a right of entry under a building agreement (*c*). Nor will the rule that a man may not derogate from his grant, apply if the grantee knew that the grantor intended to use the adjoining land for a particular purpose, and that that purpose was inconsistent with an implied grant of the easements required for the enjoyment of the property conveyed (*d*), nor does the rule affect the equally binding obligation that may in certain cases be imposed upon a grantee not to use his land so as to frustrate the purpose for which, in the contemplation of both parties, the land retained by the grantor was intended to be used (*e*).

Derogation from grant.

Co. v. *Great Northern and City Railway Co.*, (1907) 1 Ch. p. 219; 75 L. J. Ch. 807.

(*y*) *Glave* v. *Harding*, 27 L. J. Ex. 286.

(*z*) *Cable* v. *Bryant*, *supra*.

(*a*) *Beddington* v. *Atlee*, 35 C. D. 317; 56 L. J. Ch. 655. See *Davies* v. *Thomas*, (1899) W. N. 244.

(*b*) *Quicke* v. *Chapman*, (1903) 1 Ch. 659; 72 L. J. Ch. 373; *Bell* v. *Financial Times*, (1903) 19 T. L. R. 433.

(*c*) *Quicke* v. *Chapman*, *supra*.

(*d*) *Birmingham, Dudley, etc., Banking Co.* v. *Ross*, 38 C. D. 295; 57 L. J. Ch. 106; *Godwin* v. *Schweppes & Co.*, (1902) 1 Ch. 926; 71 L. J. Ch. 438. See *Frederick Betts* v. *Pickford & Co.*, (1906) 2 Ch. 87, 94; 75 L. J. Ch. 483.

(*e*) *Lyttelton Times Co* v. *Warner & Co.*, (1907) A. C. p. 481; 76 L. J. P. C. 106; *Jones* v. *Pritchard*, (1908) 1 Ch. p. 636; 77 L. J. Ch. 405.

Having regard to sect. 6 of the Conveyancing Act, 1881, the fact that in the conveyance to the purchaser the land retained by the vendor is described as "adjoining land" is not of itself sufficient to show an intention that the right to lights is not to pass (*f*). The expression "lights enjoyed" in the above section is confined to the light enjoyed under such circumstances as would reasonably and properly lead to an expectation that the enjoyment of that light would be continued (*g*). If land and houses upon is simply conveyed, the mere fact of building on the part of the purchaser to build upon is not sufficient to give him a grant of light over land retained by the grantor (*h*). But if a man intending to build upon the land of another contracts to purchase it and forthwith pull down the houses upon it, and afterwards takes a conveyance of the land with the buildings erected upon it, the right to the access of light to the windows of the houses *de facto* existing at the time of the grant passes by the conveyance, and the grantor has no right to derogate from his grant by blocking such windows (*i*).

General words in a grant—how restricted.

General words in a grant are restricted to the property which the grantor had power at the time to grant, and do not extend to anything which he might subsequently acquire. Where, accordingly, a lessor granted a lease for twenty-one years of a house with its appurtenances among which lights were specified; and at the time of the grant he had an adjoining house for a term of years; and subsequently acquired the reversion expectant on the term in the former house; and after the expiration of the term he began to build on the site of the latter house a building which might interfere with the lights of the demised house, those lights not being at the time of the lessor was not by his gr[illegible]

(*f*) *Broomfield* [illegible] Ch. 602; *Wood* v. *Gaze*, [illegible] 831; [illegible] J. Ch. 404

(*g*) [illegible] v. *Selfridges & Co.*, [illegible] 326; 71 L. J. Ch. 458.

(*h*) *Blanchard* v. *Bridges*, 4 A. & E. [illegible] 5 L. [illegible] (N. S.) K. B. 78; [illegible] v. *Grave*, 21 W. R. 22[illegible] L. T. 648; 29 L. T. 7.

(*k*) [illegible]th v. *Alcock*, 8 Ch. 663; 42 L. J. Ch. 557; and see *Beddington* v. *Atlee*, 35 C. D. 317, 327; 56 L. J. Ch. 655; *Godwin* v. *Schweppes*, (1902) 1 Ch. pp. 932, 933; 71 L. J.

The mere fact of there being windows in an adjoining house which overlooks a purchased property is not constructive notice of any agreement giving a right of access of light to them (*l*), and on the sale of a house with windows overlooking the land of a third person, no representation or warranty is implied that the windows are entitled to the access of light over the land (*m*).

Grant of land adjoining house retained.

If an owner of land, who grants part to a purchaser, intends to reserve any right in favour of the part retained, such reservation must be expressly made, and will not be implied, except in the case of an easement of necessity (*n*). In a recent case (*o*), where an owner of two adjoining houses granted one, and retained the other without reserving any rights over the premises granted, and the grantee blocked out the light coming to one of the grantor's windows which lighted a pantry, it was held that there was no implied reservation to the grantor of the right to the access of light to his window, inasmuch as it was not an easement of necessity within the exception to the rule in *Wheeldon* v. *Burrows*.

Grant of house and land to different purchasers simultaneously.

Where the owner of a house with lights looking over his adjoining land sells the house to one person and the land to another at the same time by contemporaneous conveyances, either purchaser being aware of the conveyance to the other, the purchaser of the land cannot build on it so as to obstruct the lights of the house (*p*). And where houses have been built by the same person, as part of the same plan or scheme, and have been sold in an unfinished state to different persons, the openings of the windows being sufficiently visible (*q*), a

Ch. 438; *Quicke* v. *Chapman*, (1903) 1 Ch. p. 666; 72 L. J. Ch. 373; *Davis* v. *Town Properties Corporation*, (1903) 1 Ch. pp. 803, 804; 72 L. J. Ch. 389.

(*l*) *Allen* v. *Seckham*, 11 C. D. 791; 47 L. J. Ch. 742.

(*m*) *Greenhalgh* v. *Brindley*, (1901) 2 Ch. 324; 70 L. J. Ch. 740.

(*n*) *Wheeldon* v. *Burrows*, 12 C. D. p. 49; 48 L. J. Ch. 853; *Ray* v. *Hazeldine*, (1904) 2 Ch. 17; 73 L. J. Ch. 537.

(*o*) *Ray* v. *Hazeldine*, *supra*.

(*p*) *Compton* v. *Richards*, 1 Price, 27; 15 R. R. 652; *Swanborough* v. *Coventry*, 9 Bing. 305; 2 L. J. (N. S.) C. P. 11; 35 R. R. 660; *Allen* v. *Taylor*, 16 C. D. 355; 50 L. J. Ch. 178.

(*q*) *Glave* v. *Harding*, 27 L. J. Ex. 286.

mutual reservation of the right to light will be implied in favour of all the purchasers (*r*).

So also, where different buildings have been erected, forming part of one common scheme or general structure, according to a plan, in accordance with which the buildings were to be erected, of which plan the predecessors in title of the defendant had notice and had approved, and which plan has also been approved by the party whose approval was necessary and his surveyor, and a recital to that effect appears in the deed under which the defendant claims title, he cannot block up the plaintiff's light, although the conveyance to the defendant was prior in date to the conveyance to the plaintiff, and did not contain any reservation of the right to light in favour of the part retained by the grantor and afterwards conveyed by him to the plaintiff (*s*).

Prescription Act, 2 & 3 Will. IV. c. 71.

The statutory rule as to the acquisition of a legal right to the enjoyment of light from long user depends upon the third and fourth sections of the Prescription Act, 2 & 3 Will. IV. c. 71 (*t*). The actual enjoyment (*u*) of light as an easement (*x*), by a dwelling-house, workshop, or other building (*y*), for twenty years next before the commencement of some suit or action in which the claim is brought in question (*z*), without adverse interruption, acquiesced in for a

(*r*) *Compton* v. *Richards*, *supra*; *Russell* v. *Watts*, 25 C. D. p. 573; cf. *Richards* v. *Rose*, 9 Exch. 218; 23 L. J. Ex. 3.

(*s*) *Russell* v. *Watts*, 10 A. C. 590, 602; 55 L. J. Ch. 158.

(*t*) See *Truscott* v. *Merchant Taylors Co.*, 11 Exch. 866; 25 L. J. Ex. 173; *Gale* v. *Abbott*, 8 Jur. N. S. 987; *Hyman* v. *Van den Bergh*, (1907) 2 Ch. p. 524; 76 L. J. Ch. 554; (1908) 1 Ch. p. 178; 77 L. J. Ch. 154.

(*u*) *Cooper* v. *Straker*, 40 C. D. 21; 58 L. J. Ch. 26; *Smith* v. *Baxter*, (1900) 2 Ch. p. 143; 69 L. J. Ch. 437; *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 205; 73 L. J. Ch. 484. The enjoyment need not be of right, ib.

(*x*) *I.e.*, distinct from the enjoyment of the land itself; see *Harbidge* v. *Warwick*, 3 Exch. 552; 18 L. J. Ex. 245; 77 R. R. 725.

(*y*) *Colls* v. *Home and Colonial Stores*, *supra*; and see *Harris* v. *De Pinna*, 33 C. D. 238; 56 L. J. Ch. 344 (structure for storing timber); *Att.-Gen.* v. *Queen Anne Garden Co.*, (1899) 60 L. T. 759 (chapel); *Clifford* v. *Holt*, (1899) 1 Ch. 698; 68 L. J. Ch. 332 (greenhouse); *Anderson* v. *Francis*, (1906) W. N. 160.

(*z*) *Cooper* v. *Hubbuck*, 12 C. B. N. S. 456; 31 L. J. C. P. 323; *Colls* v. *Home and Colonial Stores*, (1904) A. C. pp. 189, 190; 73 L. J.

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year (*a*), is made by those sections to confer an absolute and indefeasible title (*b*), unless the enjoyment can be shown to have been by some consent or agreement (*c*) expressly made or given for that purpose by deed or writing (*d*), whether the consent or agreement be given or made before or after the commencement of the statutory period (*e*).

As regards light claimed under sect. 3, enjoyment as of right need not be alleged or proved, the right whatever it may be is acquired by twenty years' use and enjoyment before an action without interruption and without consent (*f*).

Section 3 of 2 & 3 Will. IV. c. 71 does not bind the Crown.

The general words in sect. 2 of the Prescription Act do not apply to light; and accordingly, the Crown not being named in sect. 3, no easement of light can be acquired against the Crown under the Act (*g*).

Nature of right to light not altered by the Act.

The Act has not altered the pre-existing law as to the nature and extent of the right to light, though it has altered the conditions or length of user by which the right may be acquired (*h*). Under the Act the owner of the dominant tenement has to prove actual enjoyment for twenty years only, before some action in which the claim is brought in

Ch. 484; *Hyman* v. *Van den Bergh*, (1907) 2 Ch. 516; 76 L. J. Ch. 554; (1908) 1 Ch. 167; 77 L. J. Ch. 154.

(*a*) See *Onley* v. *Gardiner*, 4 M. & W. 497; 8 L. J. (N. S.) Ex. 102; 51 R. R. 704; *Presland* v. *Bingham*, 41 C. D. 268; *Harbidge* v. *Warwick*, *supra*; *Smith* v. *Baxter*, (1900) 2 Ch. 138; 69 L. J. Ch. 437.

(*b*) The right is inchoate until it is established in legal proceedings: *Hyman* v. *Van den Bergh*, *supra*.

(*c*) The consent or agreement can be by tenant in occupation of the dominant tenement: *Hyman* v. *Van den Bergh*, (1908) 1 Ch. p. 179; 77 L. J. Ch. 154.

(*d*) See *Truscott* v. *Merchant Taylors Co.*, *supra*; *Tapling* v. *Jones*, 11 H. L. C. 290; 34 L. J. C. P. 342; *Bewley* v. *Atkinson*, 13 C. D. 283; 49 L. J. Ch. 6; *Easton* v. *Isted*, (1903) 1 Ch. 405; 71 L. J. Ch. 442; *Ruscoe* v. *Grounsell*, (1904) 89 L. T. 426; *Hyman* v. *Van den Bergh*, *supra*.

(*e*) *Hyman* v. *Van den Bergh*, (1907) 2 Ch. p. 530; affirmed, (1908) 1 Ch. 167; 77 L. J. Ch. 154.

(*f*) *Truscott* v. *Merchant Taylors Co.*, 11 Ex. 855; 25 L. J. Ex. 173; *Frewen* v. *Phillips*, 11 C. B. N. S. 449; 30 L. J. C. P. 356; *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 205; 73 L. J. Ch. 484; *Fear* v. *Morgan*, (1906) 2 Ch. p. 417; 75 L. J. Ch. 787; affirmed, *sub nom. Morgan* v. *Fear*, (1907) A. C. 425; 76 L. J. Ch. 660.

(*g*) *Perry* v. *Eames*, (1891) 1 Ch. 658; 60 L. J. Ch. 345; *Wheaton* v. *Maple*, (1893) 3 Ch. 48; 62 L. J. Ch. 963.

(*h*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. pp. 198, 199; 73 L. J. Ch. 484.

question, and is not concerned with questions of right and of the title to the servient tenement, but the Act has given to the owner of the servient tenement two defences: (i.) the agreement mentioned in sect. 3; and (ii.) the interruption mentioned in sect. 4. In cases in which either of these offences is applicable, the plaintiff cannot evade the Act by setting up any mode of claim other than that conferred on him by the Act. A plaintiff could not therefore, by pleading lost grant instead of the Act, evade the defences given by sects. 3 and 4. But where there is no express defence provided by the Act for the servient tenement, the right may still be claimed on any ground available before the Act (*i*).

Till action commenced right inchoate.

Under the Act the actual enjoyment of light for the period of twenty years without interruption confers only an inchoate title, no absolute or indefeasible right can be acquired till the claim to the right is brought in question in some action or suit. It is not, therefore, every consecutive period of twenty years that satisfies the Act, it must be a period immediately previous to and terminating in some action or suit in which the right shall be brought into question (*k*).

The period of twenty years.

Evidence.

The evidence to sustain a prescription at common law need not come down to any defined period (*l*); but in cases coming within the Act the enjoyment must be up to the commencement of some action in which the particular claim has been brought into question (*m*).

An "interruption" within the Act.

Interruption of the enjoyment will not prevent the right from being acquired under the statute, unless the interruption has been submitted to for one year after the party interrupted shall have had notice thereof (*n*). The term "interruption"

(*i*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. pp. 190, 191; 73 L. J. Ch. 484; *Hyman* v. *Van den Bergh*, (1908) 1 Ch. pp. 176-178; 77 L. J. Ch. 154.

(*k*) *Hyman* v. *Van den Bergh* (1908) 1 Ch. p. 173; 77 L. J. Ch. 154.

(*l*) *Cooper* v. *Hubbuck*, 12 C. B. N. S. 156; 31 L. J. C. P. 323. See *Hyman* v. *Van den Bergh*, (1908) 1 Ch. p. 178; 77 L. J. Ch. 154.

(*m*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. pp. 189, 190; 73 L. J. Ch. 484; *Hyman* v. *Van den Bergh*, (1907) 2 Ch. p. 525; 76 L. J. Ch. 554; (1908) 1 Ch. pp. 171, 173; 77 L. J. Ch. 154.

(*n*) 2 & 3 Will. IV. c. 71, s. 4; *Onley* v. *Gardiner*, 4 M. & W. p. 497; 8 L. J. (N. S.) Ex. 102; 51 R. R. 704; *Harbidge* v. *Warwick*, 3 Exch. p. 557; 18 L. J. Ex. 245; 77 R. R. 725; *Seddon* v. *Bank of*

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in the statute refers to an actual obstruction, and not to a mere discontinuance of user (*o*). The twenty years' enjoyment which gives an absolute right to the access of light need not be an enjoyment, in fact "without interruption" for the period mentioned, but an enjoyment without such interruption as is contemplated by the statute (*p*). An interruption accordingly after an enjoyment of nineteen years, and the fraction of a year, is not such an interruption as will prevent the right from becoming absolute at the end of the twentieth year (*q*). But an action for an injunction to restrain an interference with the light cannot be brought until after the twenty years have expired (*r*).

"Enjoyment" of light within the Act.

To acquire a right to the access of light by actual enjoyment under the Act, it is not necessary that the house should be occupied (*s*), or that it should be fit for immediate occupation during the statutory period (*t*). The "enjoyment" of the light, within the meaning of the Act, commences as soon as the exterior walls of the building with the spaces for the windows are completed, and the building roofed in, although the window sashes and glass may not be put in and the interior may not be finished until some time afterwards (*u*).

It is necessary, however, that the light should have reached the house by the same definite channel for the statutory

Bolton, 19 C. D. 462 ; 51 L. J. Ch. 542 ; *Presland* v. *Bingham*, 41 C. D. 268 ; 60 L. T. 433.

(*o*) *Smith* v. *Baxter*, (1900) 2 Ch. 138, 143 ; 69 L. J. Ch. 437 ; *Hyman* v. *Van den Bergh*, (1907) 2 Ch. p. 527 ; 76 L. J. Ch. 554.

(*p*) *Glover* v. *Coleman*, L. R. 10 C. P. 108 ; 44 L. J. C. P. 66 ; *Hyman* v. *Van den Bergh*, (1907) 2 Ch. p. 524 ; 76 L. J. Ch. 554.

(*q*) *Flight* v. *Thomas*, 8 Cl. & Fin. 231 ; 52 R. R. 468, 478. See *Eaton* v. *Swansea Waterworks Co.*, 17 Q. B. 274 ; 20 L. J. Q. B. p. 484 ; 85 R. R. 455, *per* Lord Campbell.

(*r*) *Carr* v. *Foster*, 3 Q. B. 581 ; 11 L. J. Q. B. 284 ; 61 R. R. 321 ; *Harbidge* v. *Warwick*, 3 Exch. 557 ; 18 L. J. Ex. 245 ; 77 R. R. 725 ; *Bridewell Hospital* v. *Ward*, 62 L. J. Q. B. 270 ; (1892) W. N. 194-6 ; *Lord Battersea* v. *Commissioners of Sewers*, (1895) 2 Ch. 708 ; 62 L. J. Ch. 81 ; *Hyman* v. *Van den Bergh*, (1907) 2 Ch. 516 ; 76 L. J. Ch. 554 ; (1908) 1 Ch. 167 ; 77 L. J. Ch. 154.

(*s*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 206 ; 73 L. J. Ch. 484 ; *Hyman* v. *Van den Bergh*, (1908) 1 Ch. p. 178 ; 77 L. J. Ch. 154.

(*t*) *Courtauld* v. *Legh*, L. R. 4 Ex. 126 ; 38 L. J. Ex. 45 ; *Collis* v. *Laugher*, (1894) 3 Ch. 659 ; 63 L. J. Ch. 851 ; *Smith* v. *Baxter*, (1900) 2 Ch. p. 143 ; 69 L. J. Ch. 437 ; *Colls* v. *Home and Colonial Stores*, *supra*.

(*u*) *Collis* v. *Laugher*, *supra*.

period (*x*), so that the light claimed is the same light that has been enjoyed for the twenty years, although the apertures for the access of light may have been altered (*y*).

Right to light acquired against tenant binds the inheritance.

The right to light, if acquired against a lessee, binds the inheritance (*z*). Where two adjoining tenements are occupied by different lessees under a common landlord, the right to light may be acquired by the lessee of one tenement as against the other tenement, and the right so acquired enures in favour of the lessee of the dominant tenement and of his successors not only as against the adjoining lessee, but also as against the common landlord and succeeding owners of the servient tenement (*a*). A reversioner has, it seems, no means of preventing the right being acquired against him, unless he can prevail on his lessee to interrupt the enjoyment, or get an acknowledgment in writing that the enjoyment is by consent (*b*).

Agreement as to windows.

There is nothing in the Act that prevents a bargain being made with respect to windows. An agreement with regard to the windows of a house for valuable consideration is enforceable in equity in the same way, and under the same conditions, as any other agreement with respect to real property (*c*).

Custom of London.

By the custom of London, a building might have been raised upon the old foundations to any height, although ancient windows or lights in the next house were obstructed, if there was no agreement restrictive of the right (*d*). But

(*x*) *Harris* v. *De Pinna*, 33 C. D. 238; 56 L. J. Ch. 344.

(*y*) *Andrews* v. *Waite*, (1907) 2 Ch. p. 510; 76 L. J. Ch. 676.

(*z*) *Simper* v. *Foley*, 2 J. & H. 555; *Frewen* v. *Phillips*, 11 C. B. N. S. 449; 30 L. J. C. P. 356; *Ladyman* v. *Grave*, 6 Ch. 767; 19 W. R. 863; *Robson* v. *Edwards*, (1893) 2 Ch. 146; 62 L. J. Ch. 378; *Fear* v. *Morgan*, (1906) 2 Ch. 406; 75 L. J. Ch. 787; affirmed, *sub nom. Morgan* v. *Fear*, (1907) A. C. 425; 76 L. J. Ch. 660; *Richardson* v. *Graham*, (1908) 1 K. B. pp. 43, 44; 77 L. J. K. B. 27.

(*a*) *Fear* v. *Morgan*, (1906) 2 Ch. 406; 75 L. J. Ch. 787; affirmed, *sub nom. Morgan* v. *Fear*, (1907) A. C. 425; 76 L. J. Ch. 660.

(*b*) *Frewen* v. *Phillips*, 11 C. B. N. S. 449; 30 L. J. C. P. 356; *Mitchell* v. *Cantrill*, 37 C. D. 56; 57 L. J. Ch. 72.

(*c*) *Bewley* v. *Atkinson*, 13 C. D. p. 300; 49 L. J. Ch. 6; and see *McManus* v. *Cooke*, 35 C. D. 681; 56 L. J. Ch. 662.

(*d*) Com. Dig., London, No. 5;

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if a title to light is shown under the Act, an obstruction cannot be justified by the custom of London, sect. 3 of the Prescription Act containing the words "any local usage or custom to the contrary notwithstanding" (*e*).

Extinguishment.

The right to the enjoyment of light by one tenement over another tenement becomes, like other easements, extinguished upon unity of seisin for an estate in fee simple and possession of both tenements in the same person (*f*), but the right is not extinguished by mere unity of seisin for an estate in fee simple without unity of possession. Thus, where a tenement with the right to light over an adjoining tenement, was demised to the plaintiff for a term of years, and during the continuance of the term the defendant obstructed the access of light and acquired the fee simple of the dominant tenement, it was held that the easement of light was not extinguished by the unity of seisin (*g*). Where there is unity of ownership of the dominant and servient tenements for different estates (*h*), and where there is merely unity of possession without unity of seisin (*i*), the easement is suspended so long as the unity of possession continues, and revives again upon the severance of the possession.

Abandonment.

The privilege of receiving light through ancient windows may be lost through abandonment. The question whether the right has been abandoned is one of intention, to be gathered from all the circumstances of the case. Mere non-user of the right is not an abandonment (*j*).

Winstanley v. *Lee*, 2 Sw. 333, 339; *Perry* v. *Eames*, (1891) 1 Ch. p. 667; 60 L. J. Ch. 345.

(*e*) See *Truscott* v. *Merchant Taylors Co.*, 11 Exch. 855; 25 L. J. Ex. 173; *Salters* v. *Jay*, 3 Q. B. 109; 11 L. J. Q. B. 173; 61 R. R. 147; *Cooper* v. *Hubbuck*, 12 C. B. N. S. 456; 31 L. J. C. P. 323; *Perry* v. *Eames*, (1891) 1 Ch. 658; 60 L. J. Ch. 345.

(*f*) *Richardson* v. *Graham*, (1908) 1 K. B. 39; 77 L. J. K. B. 27.

(*g*) See note (*f*), *supra*.

(*h*) *Simper* v. *Foley*, 2 J. & H. 555.

(*i*) *Ladyman* v. *Grave*, 6 Ch. 763; 19 W. R. 863.

(*j*) *Moore* v. *Rawson*, 3 B. & C. 332; 3 L. J. K. B. 32; 27 R. R. 375; *Scott* v. *Pape*, 31 C. D. 554, 576; 54 L. J. Ch. 914. See *Midland Railway Co.* v. *Gribble*, (1895) 2 Ch. pp. 827, 831; 64 L. J. Ch. 826; *Smith* v. *Baxter*, (1900) 2 Ch. p. 142; 69 L. J. Ch. 437; *Cowper* v. *Milburn*, (1908) 52 S. J. 316 (H. L.); *Hanbury* v. *Llanfrechla Urban Council*, (1911) 9 L. G. R. pp. 364, 365 (Water).

Alteration of premises on rebuilding.

The mere alteration of a building containing ancient lights without evidence of intention to abandon does not imply an abandonment of the statutory right to the access and use of light to or for any building which may be substituted for the original building; the intention to abandon the right must be clearly established by evidence (*k*). Where a building while it existed had the right to have its ancient lights unobstructed and the building is taken down, the right is not abandoned but is only in abeyance. Until the right is abandoned, it is as much in existence after the building is pulled down as it was before, and is as much in the possession of the owner of the legal right as ever, even although his actual enjoyment of it may be suspended. There is nothing to prevent him from applying to the Court for an injunction to restrain an erection which would interfere with the easement of ancient lights where the Court is satisfied that he is about to restore the building with its ancient lights (*l*).

Alteration of windows.

An owner of ancient lights who alters or rebuilds his premises does not by altering the plane and size of his windows lose his right to the amount of light which was wont to pass through the old windows and to which he was entitled (*m*). If he enlarges the windows, he still has the same right to that amount of light which, for the period of twenty years before the action, has passed through so much of the old windows as is left undisturbed; nor is the right lost by reason of the fact that only part of the old window is included in the new, or that the old window has been added to, either vertically or laterally, by a new window. No alteration in the plane of the windows of the dominant tenement will destroy the right, so long as the owner of the dominant tenement can show that he is using through the new apertures the same, or a substantial part of the same, light which passed through the old apertures into

(*k*) *Greenwood* v. *Hornsey*, 33 C. D. 471; 55 L. J. Ch. 917; and see *Smith* v. *Baxter*, *supra*.

(*l*) *Ecclesiastical Commissioners* v. *Kino*, 14 C. D. pp. 213, 219; 49 L. J. Ch. 529.

(*m*) *National Provincial Glass Co.* v. *Prudential Insurance Co.*, 6 C. D. 757; 46 L. J. Ch. 871; *Newson* v. *Pender*, 27 C. D. p. 46; *Smith* v. *Baxter*, (1900) 2 Ch. 138; 69 L. J. Ch. 437; *Andrews* v. *Waite*, (1907) 2 Ch. pp. 509, 510; 76 L. J. Ch. 676.

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the old buildings (*n*). The question in the case of an alteration of a building is not whether the new windows are in the same vertical plane, and to what extent has their position in the line of incidence of the light been altered, but whether the light claimed is substantially the same light that has been enjoyed throughout the period of twenty years; the real test in these cases is identity of light, and not identity of aperture or entrance for the light (*o*). An owner who, on the alteration of buildings or the rebuilding of his premises, comes to the Court for the protection of ancient lights, must have evidence to show that some part of the old windows coincided with some part of the new windows (*p*). The dominant owner may lose his right to relief, even where there is no substantial alteration of his building, if he has by his alterations so confused the evidence that he cannot prove the identity of the light (*q*).

Alteration of building.

The fact that the owner of the dominant tenement has to some extent contributed to the diminution of his ancient lights by the alterations in his building will not in itself preclude him from obtaining an injunction against a person who illegally obstructs what remains of his ancient lights (*r*). But where, before the rebuilding of the dominant tenement by the plaintiff, a partial obstruction by the owner of the servient tenement of the plaintiff's ancient lights would not have amounted to an actionable nuisance, such an obstruction, even though it may completely block out the remnant of light left after the rebuilding, will not be an actionable wrong (*s*).

Form of order.

The order, when expressed in general terms, restrains the defendant from erecting any building "so as to cause a

(*n*) *Scott* v. *Pape*, 31 C. D. 554; 54 L. J. Ch. 914; *Andrews* v. *Waite*, *supra*.

(*o*) *Andrews* v. *Waite*, *supra*.

(*p*) *Fowlers* v. *Walker*, 51 L. J. Ch. 443; (1881) W. N. 77; *Pendarves* v. *Munro*, (1892) 1 Ch. 611; 61 L. J. Ch. 494.

(*q*) *Scott* v. *Pape*, 31 C. D. 554; 54 L. J. Ch. 914.

(*r*) *Staight* v. *Burn*, 5 Ch. 163; 39 L. J. Ch. 289. See *Ankerson* v. *Connelly*, (1906) 2 Ch. 544; 75 L. J. Ch. 804; (1907) 1 Ch. p. 683; 76 L. J. Ch. 402; *Andrews* v. *Waite*, (1907) 2 Ch. p. 510; 76 L. J. Ch. 676.

(*s*) *Ankerson* v. *Connelly*, (1906) 2 Ch. 544; 75 L. J. Ch. 804; (1907) 1 Ch. 678; 76 L. J. Ch. 402.

nuisance or illegal obstruction" to the plaintiff's ancient lights. The order also, after providing for the plaintiff's costs of the action up to and including the hearing, may give liberty to the plaintiff to apply within a fixed time, after receiving notice of the completion of the defendant's building, for further relief by way of mandatory injunction or damages (*t*).

Reference to chambers on granting the injunction.

If the evidence does not enable the Court to come to a satisfactory conclusion on a particular point, the Court will, with the view of freeing both parties from inconvenience so that the one may know previously what he may safely do and the other what he may safely object to, give liberty to the parties on granting the injunction to apply in chambers with respect to the erection of buildings (*u*). So, also, the Court may make a declaration of the plaintiff's right in lieu of granting an injunction, the defendant undertaking to give the plaintiff reasonable notice of his intention to build and to produce to the plaintiff upon request his building plans (*x*).

Passage of air.

Windows which have the privilege of receiving light have also the privilege of receiving air, so that a person may not obstruct the passage of air to the windows of his neighbour to such an extent as to cause a nuisance (*y*). But it is only in very rare and special cases, involving danger to health, or at least something very nearly approaching to it, that the Court would be justified in interfering on the ground of diminution of air (*z*). There may, however, be circumstances in the case such as to justify the Court in holding that a grant of a

(*t*) See *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 194; 73 L. J. Ch. 484; *Anderson* v. *Francis*, (1906) W. N. 160; *Higgins* v. *Betts*, (1905) 2 Ch. p. 218; 74 L. J. Ch. 621; *Andrews* v. *Waite*, (1907) 2 Ch. p. 510; 76 L. J. Ch. 676. And as to mandatory orders being certain and definite in their terms, see *Jackson* v. *Normandy Brick Co.*, (1899) 1 Ch. 438; 68 L. J. Ch. 407; *Att.-Gen.* v. *Staffordshire County Council*, (1905) 1 Ch. p. 342; 74 L. J. Ch. p. 155.

(*u*) *Stokes* v. *City Offices Co.*, 2 H. & M. 650; *Yates* v. *Jack*, 1 Ch. 295; 35 L. J. Ch. 539; and see *Smith* v. *Baxter*, (1900) 2 Ch. 138; 69 L. J. Ch. 437; *Att.-Gen.* v. *Staffordshire County Council*, *supra*.

(*x*) *Smith* v. *Baxter*, *supra*.

(*y*) *Aldred's case*, 9 Co. Rep. 58, a. See *Cable* v. *Bryant*, (1908) 1 Ch. pp. 263, 264; 77 L. J. Ch. 78.

(*z*) *City of London Brewery Co.* v. *Tennant*, 9 Ch. p. 221; 43 L. J. Ch. 458, *per* Lord Selborne; *Baxter* v. *Bower*, 44 L. J. Ch. 626; *Perkins* v. *Slater*, 35 L. T. 356.

right to the free passage of air to the house of a neighbour may be implied (*a*). So also where the uninterrupted flow of air through a definite aperture or channel over a neighbour's land has been enjoyed for a sufficient period, a right by way of easement may be acquired (*b*). But in the absence of actual contract a claim by way of easement to have the general current of air coming from a neighbour's land kept uninterrupted cannot be supported either at common law or under the statute (*c*). The access of air accordingly to the chimney of a building cannot as against the occupier of neighbouring land be claimed either as a natural right of property or as an easement by prescription from the time of legal memory or by a lost grant or under the Prescription Act (*d*). So also the right of passage of undefined air for the purpose of serving a windmill (*e*) or drying timber (*f*) cannot be claimed by prescription. Where, however, a lease was granted in order that the land demised might be used for the purpose of carrying on the business of a timber merchant, and the lessee covenanted to carry on such business accordingly, it was held that the lessor was not entitled to build upon the adjoining property so as to interrupt the access of air to sheds upon the demised property used for drying timber, so as to interfere with the carrying on of the business in the ordinary course (*g*).

(*a*) *Bass* v. *Gregory*, 25 Q. B. D. 481; 59 L. J. Q. B. 574; *Aldin* v. *Latimer Clark*, (1894) 2 Ch. 437; 63 L. J. Ch. 601; *Cable* v. *Bryant*, (1908) 1 Ch. pp. 263, 264; 77 L. J. Ch. 78.

(*b*) *Cable* v. *Bryant*, *supra*; and see *Browne* v. *Flower*, (1911) 1 Ch. p. 226; 80 L. J. Ch. 181.

(*c*) *Harris* v. *De Pinna*, 33 C. D. 238; 56 L. J. Ch. 344; *Chastey* v. *Ackland*, (1895) 2 Ch. 389; 64 L. J. Q. B. 523; (1897) A. C. 155; 66 L. J. Q. B. 518 (H. L.); *Davis* v. *Town Properties Corporation*, (1903) 1 Ch. pp. 804, 805; 72 L. J. Ch. 389; *Browne* v. *Flower*, (1911) 1 Ch. p. 226; 80 L. J. Ch. 181.

(*d*) *Bryant* v. *Lefever*, 4 C. P. D. 172; 48 L. J. Q. B. 380; *Davis* v. *Town Properties Corporation*, (1903) 1 Ch. p. 804; 72 L. J. Ch. 389; but see *Cable* v. *Bryant*, (1908) 1 Ch. p. 263; 77 L. J. Ch. 78.

(*e*) *Webb* v. *Bird*, 13 C. B. N. S. 841; 31 L. J. C. P. 335; *Davis* v. *Town Properties Corporation*, *supra*.

(*f*) *Harris* v. *De Pinna*, 33 C. D. 238; 56 L. J. Ch. 344.

(*g*) *Aldin* v. *Latimer Clark*, (1894) 2 Ch. 437; 63 L. J. Ch. 601; see *Cable* v. *Bryant*, (1908) 1 Ch. pp. 263, 264; 77 L. J. Ch. 78; *Browne* v. *Flower*, (1911) 1 Ch. p. 226; 80 L. J. Ch. 181; and see *Tebb* v. *Cave*, (1900) 1 Ch. 642; 69 L. J. Ch. 282,

The enjoyment of pure and wholesome air is a right to which the owners of land and the inmates of a dwelling-house are of common right entitled. Any act which pollutes or corrupts the air is, strictly speaking, a nuisance (*h*); but, inasmuch as the business of life in cities and populous neighbourhoods renders it impossible that the air should retain its natural state of purity, the law does not regard trifling inconveniences. In order to constitute an actionable nuisance, the pollution of the air must be of so sensible a nature as to diminish materially the value or interfere materially with the comfort and enjoyment of property which a reasonable man is entitled to expect, regard, however, being always had to the situation and mode of occupation of the property injuriously affected (*i*). That which is a sensible and real inconvenience to property in one place, and occupied in one way, will be none to property situate in another place or occupied in another way. If a man lives in a town, he must of necessity submit himself to the consequences of the obligations of trade which may be carried on in his immediate locality, and are necessary for the purposes of commerce and for the benefit of the inhabitants of the town and the public at large (*k*). But the law requires that business be carried on in a reasonable and proper manner, and so as not to cause unnecessary inconvenience. A man, who by an act on his own land causes so much annoyance to another in the enjoyment of a neighbouring tenement

and the comments on this decision in *Davis* v. *Town Properties Corporation*, *supra*.

(*h*) *Aldred's case*, 9 Co. R. 58 b.

(*i*) *Tipping* v. *St. Helen's Smelting Co.*, 4 B. & S. 608; *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 642; 35 L. J. Q. B. 66; *Salvin* v. *North Brancepeth Coal Co.*, 9 Ch. 705; 44 L. J. Ch. 149; and see *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 185; 73 L. J. Ch. 484; *Kine* v. *Jolly*, (1905) 1 Ch. pp. 489, 490; 74 L. J. Ch. 174; affirmed, *sub nom. Jolly* v. *Kine*, (1907) A. C. 1; 76 L. J. Ch. 1; *Rushmer* v. *Polsue and Alfieri*, (1906) 1 Ch. pp. 237, 245, affirmed, *sub nom. Polsue and Alfieri* v. *Rushmer*, (1907) A. C. 121; 76 L. J. Ch. 365; *Adams* v. *Ursell*, (1913) 1 Ch. 269; 82 L. J. Ch. 157.

(*k*) See *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 185; 73 L. J. Ch. 484; *Kine* v. *Jolly*, (1905) 1 Ch. pp. 489, 490; 74 L. J. Ch. 174; *Rushmer* v. *Alfieri & Co.*, (1906) 1 Ch. 234; 75 L. J. Ch. 79; affirmed, *sub nom. Polsue* v. *Rushmer*, (1907) A. C. p. 123; 76 L. J Ch. 365.

as to amount to a nuisance, cannot be heard to say that the place where the act was done was a proper and convenient one for the purpose (*l*), and that every endeavour has been made to abate the nuisance (*m*).

Whether or not the pollution of air is substantial enough to induce the Court to exercise its protective jurisdiction is a question which must depend on the particular circumstances of the case. It is impossible to find any precise standard by which to determine the question; in each case it is a question of degree (*n*). The Court may appoint a special referee to inspect and report as to the extent of the nuisance (*o*). Injunctions will be granted, on a proper case being made out, to restrain persons from burning bricks (*p*), or discharging smoke (*q*), or other noxious or offensive vapours, odours, or gases (*r*). Mere smoke or offensive odour alone, unaccom-

(*l*) *Tipping* v. *St. Helen's Smelting Co.*, 4 B. & S. 608, 615; *Bamford* v. *Turnley*, 3 B. & S. 62; 31 L. J. Q. B. 286; *Reinhardt* v. *Mentasti*, 42 C. D. 685; 58 L. J. Ch. 787; *Att.-Gen.* v. *Cole*, (1901) 1 Ch. 205; 70 L. J. Ch. 148.

(*m*) *Att.-Gen.* v. *Plymouth Fish Guano Co.*, (1912) 76 J. P. 19; *Adams* v. *Ursell*, (1913) 1 Ch. p. 272; 82 L. J. Ch. 157.

(*n*) *Wells* v. *Home and Colonial Stores*, (1904) A. C. p. 185; 73 L. J. Ch. 484; *Polsue and Alfieri* v. *Rushmer*, (1907) A. C. p. 123; 76 L. J. Ch. 365.

(*o*) *Broder* v. *Saillard*, 2 C. D. p. 694; 45 L. J. Ch. 414.

(*p*) *Walter* v. *Selfe*, 4 De G. & S. 325, on appeal, 20 L. J. Ch. 433; *Bamford* v. *Turner*, 31 L. J. Q. B. 286; *Beardmore* v. *Treadwell*, 3 Giff. 683; compromised on appeal, ib. 701; 31 L. J. Ch. 892; *Cleeve* v. *Mahony*, 25 J. P. 819; *Boreham* v. *Hall*, (1870) W. N. 57; *Crawford* v. *Hornsea, etc., Steam Co.*, (1876) W. N. 132; 45 L. J. Ch. 432.

(*q*) *Sampson* v. *Smith*, 8 Sim. 272; 7 L. J. Ch. 260; *Crump* v. *Lambert*, 3 Eq. 409; *Hayward* v. *Richards*, 1 Set. 595; *Smith* v. *Midland Railway Co.*, 26 W. R. 10; (1877) W. N. 200.

(*r*) *Broadbent* v. *Imperial Gaslight Co.*, 7 De G. M. & G. 436; 7 H. L. C. 600; 26 L. J. Ch. 276; *Tipping* v. *St. Helen's Smelting Co.*, 1 Ch. 66 (copper works); *Barlow* v. *Bailey*, (1871) W. N. 95 (chemical works); *Cooke* v. *Forbes*, 5 Eq. 166; 37 L. J. Ch. 178 (chemical works); *Savile* v. *Kilner*, 26 L. T. 277 (glass works); *Salvin* v. *North Brancepeth Coal Co.*, 9 Ch. 705; 44 L. J. Ch. 149 (coke ovens); *Umfreville* v. *Johnson*, 10 Ch. 580; 44 L. J. Ch. 752 (cement works); *Att.-Gen.* v. *Francis*, 1 Set. 595 (cement works); *Knight* v. *Gardner*, 19 L. T. 673 (manure works); *Gullick* v. *Tremlett*, 20 W. R. 358; *Bigsby* v. *Dickinson*, 25 W. R. 89 (chemical works); *Shotts Iron Co.* v. *Inglis*, 7 A. C. 515; *Fleming* v. *Hislop*, 11 A. C. 691 (calcining); *Dore* v. *Pecorini*, 31 S. J. 726 (kitchen

panied by noxious vapours, is a sufficient ground for the interference of the Court (*s*). The fact that a man may have sold land with a full knowledge that certain works were about to be erected thereon, does not disentitle him or those claiming under him to complain of any nuisance which the works may cause (*t*).

Various nuisances to air.

A limekiln (*u*), a dye house (*x*), a tan-pit, a glass house (*y*), a smelting-house, a tallow-furnace (*z*), a soap-boilery (*a*), a building for boiling whale blubber (*b*), or for boiling horse-flesh for dogs (*c*), a tallow chandler's shop (*d*), fat-melting works (*e*), a varnish maker's shop (*f*), a slaughter-house (*g*), a brew-house (*h*), and a hog-stye (*i*), have all been held to be nuisances at common law (*k*). But a brew-house (*l*) or a

odours): *Rapier* v. *London Tramways Co.*, (1893) 2 Ch. 588; 63 L. J. Ch. 36 (stables); *Att.-Gen.* v. *Tod-Heatley*, (1897) 1 Ch. 560; 66 L. J. Ch. 275 (refuse); *Robinson* v. *London General Omnibus Co.*, (1909) 26 T. L. R. 233 (motor bus fumes); *Att.-Gen.* v. *Plymouth Fish Guano Co.*, (1912) 76 J. P. 19.

(*s*) *Crump* v. *Lambert*, 3 Eq. 409 (factory chimney); *Gullick* v. *Tremlett*, 20 W. R. 358; *Borehan* v. *Hall*, (1880) W. N. 57; 22 L. T. 116. See *Swaine* v. *Great Northern Railway Co.*, 4 De G. J. & S. 211; 33 L. J. Ch. 399; *Sanders-Clark* v. *Grosvenor Mansions Co.*, (1900) 2 Ch. 376 (heat and smell) (cooking range); *Att.-Gen.* v. *Keymer Brick Co.*, (1903) 67 J. P. 434 (odours from house refuse); *Att.-Gen.* v. *Plymouth Fish Guano Co.*, (1912) 76 J. P. 19; *Adams* v. *Ursell*, (1913) 1 Ch. 269; 82 L. J. Ch. 137 (fried fish shop).

(*t*) *Tipping* v. *St. Helen's Smelting Co.*, 1 Ch. 66.

(*u*) See *Aldred's case*, 9 Co. R. 58 b.

(*x*) Ib.

(*y*) *Jones* v. *Powell*, Palm. 539.

(*z*) *Morley* v. *Pragnell*, Cro. Car. 510; 1 Roll. Ab. 88. See, as to candle-making being a nuisance, *Arnot* v. *Brown*, 1 Macq. 229, and see Public Health Act, 1875, s. 112; amended by 7 Edw. 7, c. 53, s. 51.

(*a*) *R.* v. *Pierce*, Show. 327. See Public Health Act, 1875, s. 112.

(*b*) *Burntisland Whale Co.* v. *Trotter*, 5 Wilson & Shaw (Sc.), 649.

(*c*) *Grindley* v. *Bo[illegible]*, 3 H. & C. 669; 34 L. J. Ex. 135.

(*d*) *Bliss* v. *Hall*, 4 Bing. N. C. 183; 7 L. J. (N. S.) C. P. 122; 4 R. R. 697. See Public Health Act, 1875, s. 112.

(*e*) *Att.-Gen.* v. *Cole*, (1901) Ch. 205; 70 L. J. Ch. 148. See Public Health Act, 1875, s. 112.

(*f*) *R.* v. *Neil*, 2 Car. & P. 485; 31 R. R. 685.

(*g*) *R.* v. *Cross*, 2 Car. & P. 484; 31 R. R. 684. See *Rapley* v. *Smart*, (1893) 10 T. L. R. 174.

(*h*) *Jones* v. *Powell*, Hutton, 136.

(*i*) *Aldred's case*, 9 Co. R. 58 b. As to nuisance caused by smell from pig stye, see *Att.-Gen.* v. *Squire*, (1907) 5 L. G. Reports, 99.

(*k*) See *Rex* v. *White*, 1 Burr. 333.

(*l*) *Att.-Gen.* v. *Cleaver*, 18 Ves. 218; 18 R. R. 159, n.; *Gorton* v. *Smart*, 1 Sim. & St. 66; 1 L. J. (O. S.) Ch. 36.

fried fish shop (*m*) are not necessarily nuisances, nor is a hospital for infectious diseases (*n*) (having regard to the present state of science (*o*)). A hospital, however, for getting together people suffering from infectious diseases will be a nuisance, if it endanger the public health by communicating disease, or if injury is caused thereby to the rights of owners of the adjoining property (*p*). But the Court will not restrain by injunction the erection of a hospital for persons suffering from small-pox merely on the ground of apprehension of danger. The Court must be satisfied that there is a well-grounded apprehension of danger, or at least that the danger is appreciable (*q*). A small-pox hospital is not a noxious or offensive business within sect. 112 of the Public Health Act, 1875 (*r*).

No time will legalise a public nuisance.

The right to carry on an offensive trade so as to corrupt and pollute the air may be acquired against an individual by prescription or presumption of lost grant, but no length of

(*m*) See *Adams* v. *Ursell*, (1913) 1 Ch. 269; 82 L. J. Ch. 157 (injunction granted); *Braintree Local Board* v. *Boyton*, (1885) 52 L. T. 99, not noxious business within sect. 112, Public Health Act, 1875; *Duke of Devonshire* v. *Brookshaw*, (1899) 81 L. T. 83 (breach of covenant against offensive trade); *Errington* v. *Birt*, (1911) 105 L. T. 373 (breach of covenant against "annoyance or inconvenience").

(*n*) *Baines* v. *Baker*, Amb. 158; *Att.-Gen.* v. *Guildford Hospital Board*, 12 T. L. R. 54; *Harrop* v. *Ossett Corporation*, 14 T. L. R. 308; *Att.-Gen.* v. *Corporation of Manchester*, (1893) 2 Ch. 87; 62 L. J. Ch. 459; *Att.-Gen.* v. *Corporation of Nottingham*, (1904) 1 Ch. 673; 73 L. J. Ch. 512; *Att.-Gen.* v. *Rathmines and Pembroke Hospital Board*, (1904) 1 Ir. R. 161.

(*o*) *Att.-Gen.* v. *Corporation of Manchester*, *Att.-Gen.* v. *Corporation of Nottingham*, *Att.-Gen.* v. *Rathmines, etc., Hospital Board*, *supra*.

(*p*) *Metropolitan Asylum District* v. *Hill*, 6 A. C. pp. 193, 207; 50 L. J. Q. B. 353.

(*q*) *Matthews* v. *Mayor, etc., of Sheffield*, 31 Sol. J. 773; *Bendelow* v. *Guardians of Wortley Union*, 36 W. R. 168; 57 L. J. Ch. 762; *Fleet* v. *Metropolitan Asylums Board*, 2 T. L. R. 361; *Att.-Gen.* v. *Corporation of Manchester*, (1893) 2 Ch. 87; 62 L. J. Ch. 459; *Att.-Gen.* v. *Rathmines and Pembroke Hospital Board*, (1904) 1 Ir. R. 161; *Att.-Gen.* v. *Nottingham Corporation*, (1904) 1 Ch. p. 677; 73 L. J. Ch. 512. As to whether evidence is admissible of what occurred in the neighbourhood of other similar hospitals, see *Hill* v. *Metropolitan Asylums District*, 42 L. T. 212; 47 L. T. 29; and *Att.-Gen.* v. *Nottingham Corporation*, *supra*.

(*r*) *Withington Local Board* v. *Corporation of Manchester*, (1893) 2 Ch. 19; 62 L. J. Ch. 393.

time will legalise a public nuisance or enable a party to prescribe for its continuance. The public health, the welfare and safety of the community, are matters of permanent importance to which all the pursuits, occupations, and employments of individuals inconsistent with their preservation must yield (*s*).

Noisy trades.

The comfort and enjoyment in their home, to which the inmates of a dwelling-house are of right entitled, may be materially interfered with by the carrying on of noisy trades in the immediate neighbourhood. The law does not, however, regard trifling inconvenience, but only regards inconveniences which sensibly and materially diminish the comfort and enjoyment of property. In order that a noisy trade may be an actionable nuisance, there must be not merely a nominal but such a sensible and real damage as a reasonable man would, if subjected to, find injurious, regard being had, not only to the thing done, but to the surrounding circumstances, such as the situation of the property, the habits of persons in the neighbourhood, and the noises existing prior to the commencement of the defendant's operations, and if, after taking all these circumstances into consideration, the Court finds a serious, and not merely a slight additional interference with the comfort of the plaintiff and his family in the occupation of his house according to the ordinary notions of reasonable persons in the locality, the Court will grant relief (*t*).

Injunctions to restrain noise.

Mere noise alone will, on a proper case of nuisance being made out, be a sufficient ground for an injunction (*u*). In-

(*s*) *Weld* v. *Hornby*, 7 East, 195; 8 R. R. 608; *R.* v. *Cross*, 3 Camp. 227; 13 R. R. 794; *Att.-Gen.* v. *Corporation of Barnsley*, (1874) W. N. 37; *Butterworth* v. *Yorkshire* (*W. R.*) *Rivers Board*, (1909) A. C. p. 57.

(*t*) *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 642; 35 L. J. Q. B. 66; *Sturges* v. *Bridgman*, 11 C. D. 852; 48 L. J. Ch. 755; *Rushmer* v. *Polsue and Alfieri*, (1906) 1 Ch. p. 237, 249; affirmed, *sub nom. Polsue* v. *Alfieri and Rushmer*, (1907) A. C. 121; 76 L. J. Ch. 365; and see *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 185; 73 L. J. Ch. 484; *Gilling* v. *Gray*, (1910) 27 T. L. R. 39; *McEwen* v. *Steedman*, (1912) S. C. 156; *New Imperial Hotel Co.* v. *Johnson*, (1912) 1 Ir. R. 327.

(*u*) *Crump* v. *Lambert*, 3 Eq. 409; 15 L. T. 600; *Fenwick* v. *East London Railway Co.*, 20 Eq. 544; 44 L. J. Ch. 602; *Lady Gort* v. *Clark*, 16 W. R. 569; *Ball* v.

junctions accordingly will be granted to restrain persons from ringing bells (*x*), or playing musical instruments (*y*), or singing (*z*), or holding noisy entertainments and bringing together disorderly crowds (*a*), or dancing in rooms above the plaintiff's flat (*b*), or whistling for cabs after midnight (*c*), or excessive noise (*d*), or excessive noise and vibration (*e*) in carrying on a

Ray, 8 Ch. 467; 21 W. R. 282; *Sturges* v. *Bridgman*, 11 C. D. 852; 48 L. J. Ch. 758, and see *Rushmer* v. *Polsue and Alfieri*, (1906) 1 Ch. pp. 237, 245; affirmed, *sub nom. Polsue and Alfieri* v. *Rushmer*, (1907) A. C. 121; 76 L. J. Ch. 365; *Robinson* v. *London General Omnibus Co.*, (1909) 26 T. L. R. 233; *Gilling* v. *Gray*, (1910) 27 T. L. R. 39. See also *Clark* v. *Lloyds Bank*, (1910) 79 L. J. Ch. 645; W. N. 187; *Heath* v. *Brighton Corporation*, (1908) 98 L. T. 718 (injunction refused). As to order for appointment of special referee to report, see *Bruler* v. *Saillard*, 2 C. D. 694; 45 L. J. Ch. 214.

(*x*) *Soltau* v. *De Held*, 2 Sim. N. S. 133; 21 L. J. Ch. 153; 89 R. R. 245. See *Hardman* v. *Holberton*, (1866) W. N. 379.

(*y*) *Christie* v. *Davey*, (1893) 1 Ch. 316; 62 L. J. Ch. 439; *Germaine* v. *London Exhibitions*, (1896) 75 L. T. 101.

(*z*) *Motion* v. *Mills*, (1897) 12 T. L. R. 246; *New Imperial Hotel Co.* v. *Johnson*, note (*t*), *supra* (limited injunction).

(*a*) *Walker* v. *Brewster*, 5 Eq. 25; 37 L. J. Ch. 33; *Inchbald* v. *Robinson*, 4 Ch. 388; 17 W. R. 459; *Winter* v. *Baker*, 3 T. L. R. 569; *Bostock* v. *North Staffordshire Railway Co.*, 5 De G. & Sm. 584; 25 L. J. Ch. 325; 90 R. R. 159; *Barber* v. *Penley*, (1893) 2 Ch. 447; 62 L. J. Ch. 623; *Lambton* v. *Mellish*, (1894) 3 Ch. 163; 63 L. J. Ch. 929; *Germaine* v. *London Exhibitions Co.*, (1896) 75 L. T. 101; *Seward* v. *Paterson*, (1897) 1 Ch. 546; *Bellamy* v. *Wells*, 60 L. J. Ch. 156; 63 L. T. 635; *Dewar* v. *City and Suburban Racecourse Co.*, (1899) 1 Ir. R. 345; *Becker* v. *Earl's Court, Limited*, (1911) 56 S. J. 73 (side shows).

(*b*) *Jenkins* v. *Jackson*, 40 C. D. 71; 58 L. J. Ch. 124.

(*c*) *Bellamy* v. *Wells*, 60 L. J. Ch. 156; 63 L. T. 635.

(*d*) *Crump* v. *Lambert*, 3 Eq. 409; 15 L. T. 600; *Goose* v. *Bedford*, 21 W. R. 449; *Barter* v. *Bower*, 44 L. J. Ch. 627; *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 642; 35 L. J. Q. B. 66; *Gaunt* v. *Fynney*, 8 Ch. 12; 42 L. J. Ch. 122; *Sturges* v. *Bridgman*, 11 C. D. 852; 48 L. J. Ch. 755; *Polsue* v. *Alfieri and Rushmer*, (1907) A. C. 121; 76 L. J. Ch. 365; *Gilling* v. *Gray*, (1910) 27 T. L. R. 39.

(*e*) *Tinckler* v. *Aylesbury Dairy Co.*, 5 T. L. R. 52 (milk cans); *Sturges* v. *Bridgman*, *supra*; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. 287; 64 L. J. Ch. 216; *Hussey* v. *Bailey*, (1896) 11 T. L. R. 175; *Knight* v. *Isle of Wight Electric Light Co.*, (1904), 73 L. J. Ch. 299; *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. 707; 73 L. J. Ch. 275; *Lipman* v. *Pulman*, (1904) W. N. 139; 91 L. T. 132; *Robinson* v. *London General Omnibus Co.*, (1909) 26 T. L. R. 233; *McEwen* v. *Steedman*, (1912) S. C. 156.

trade; so as to affect injuriously the comfortable occupation of a person's property and his health and that of his family.

Early building operations.

In a recent case (*f*) the Court refused to restrain building operations, which were being conducted in a reasonable manner, from commencing before seven in the morning, even though the noise from the works was a very serious annoyance to the plaintiff, and injury to his hotel business.

Various nuisances.

Other cases of nuisance to dwelling-houses where equitable relief has been sought are: a gunpowder factory (*g*); the storing of damp jute, or other highly combustible material (*h*); blasting operations (*i*); excessive heat from stoves (*k*); the obstruction of a chimney (*l*); the obstruction of the passage of air through a defined channel to a cellar (*m*); allowing damp from an artificial mound to soak into the wall of a dwelling-house (*n*); raising the surface of land by an artificial erection so as to cause more rainwater than was wont to flow into a house (*o*); damage from a cesspool flowing into a ditch used for surface drainage (*p*); damage from the insanitary condition of land caused by a gipsy encampment (*q*); the deposit of house refuse (*r*); the erection of a public urinal in a street so as to be a nuisance (*s*); the estab-

(*f*) *Clark* v. *Lloyds Bank*, (1910) 79 L. J. Ch. 645 (interlocutory injunction); W. N. 187.

(*g*) *Crowder* v. *Tinkler*, 19 Ves. 617; 13 R. R. 267; *McMurray* v. *Cadwell*, (1899) W. N. 216; (1900) W. N. 63.

(*h*) *Hepburn* v. *Lordan*, 2 H. & M. 345; 34 L. J. Ch. 293.

(*i*) *Arnold* v. *Furness Railway Co.*, 22 W. R. 613.

(*k*) *Reinhardt* v. *Mentasti*, 42 C. D. 685; 58 L. J. Ch. 787; *Sandars-Clark* v. *Grosvenor Mansions Co.*, (1900) 2 Ch. 373. See as to this latter case, *Att.-Gen.* v. *Cole*, (1901) 1 Ch. pp. 206, 207; 70 L. J. Ch. 148.

(*l*) *Hervey* v. *Smith*, 1 K. & J. 389; 22 Beav. 299; see *Cable* v. *Bryant*, (1908) 1 Ch. p. 263; 77 L. J. Ch. 78; cf. *Bryant* v. *Lefevre*, 4 C. P. D. 172.

(*m*) *Bass* v. *Gregory*, 25 Q. B. D. 481; 59 L. J. Q. B. 574. See *Cable* v. *Bryant*, (1908) 1 Ch. 259; 77 L. J. Ch. 78.

(*n*) *Broder* v. *Saillard*, 2 C. D. 692; 45 L. J. Ch. 214; see 7 Edw. 7, c. 53, sects. 2 (2) and 35 (3).

(*o*) *Hurdman* v. *North Eastern Railway Co.*, 3 C. P. D. 168; 47 L. J. C. P. 368.

(*p*) *Philips* v. *Crouch*, (1866) W. N. 399.

(*q*) *Att.-Gen.* v. *Stone*, (1895) 12 T. L. R. 76; 60 J. P. 168.

(*r*) *Att.-Gen.* v. *Tod-Heatley*, (1897) 1 Ch. 560; 66 L. J. Ch. 275; *Att.-Gen.* v. *Keymer Brick Co.*, (1903) 67 J. P. 434.

(*s*) *Biddulph* v. *St. George's*

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lishment of a rifle range, or a range for trying firearms in the immediate neighbourhood of a dwelling-house (*t*); keeping cattle in a pen (*u*), or pigs (*x*), or horses in a stable (*y*), in the immediate neighbourhood of a dwelling-house; using a garden as a skittle and bowling alley (*z*); children in hospital crying through neglect (*a*); holding a regatta with aquatic sports on a reservoir, disturbing the fishing rights of the plaintiff vendor to the defendant company (*b*); holding horseraces on Sundays and collecting noisy crowds (*c*); the obstruction of a footpath in front of a house (*d*); the obstruction of the access to a house by causing crowds to assemble outside a theatre (*e*); the breaking up a pavement (*f*); noise, vibration and fumes from shunting, turning, and repairing omnibuses in a street (*g*).

Damages for past injury.

Where a plaintiff had sustained serious injury to her health

Vestry, 3 De G. J. & S. 493; 33 L. J. Ch. 411; *Vernon* v. *St. James' Vestry*, 16 C. D. 449; 50 L. J. Ch. 81; *Chibnal* v. *Paul*, 29 W. R. 536; *Sellors* v. *Matlock Local Board*, 14 Q. B. D. 929; 52 L. T. N. S. 782; *Pethick* v. *Plymouth Corporation*, (1894) 42 W. R. 246; *Hoare* v. *Lewisham Borough Council*, 18 T. L. R. 64; *Leyman* v. *Hessle Urban Council*, (1902) 19 T. L. R. 73; *Mayo* v. *Seaton Urban Council*, (1903) 68 J. P. 7. See sect. 39, Public Health Act, 1875, and sect. 47, Public Health Acts (Amendment) Act, 1907.

(*t*) *Bannister* v. *Bigge*, 34 Beav. 287; *Darvall* v. *Dougall*, 1 Set. 598; *Cadbury* v. *Walker*, ib. 599; *Hawley* v. *Steele*, 6 C. D. 5 21; 46 L. J. Ch. 782.

(*u*) *London, Brighton, etc., Railway Co.* v. *Truman*, 11 A. C. 45; 55 L. J. Ch. 354.

(*x*) *Att.-Gen.* v. *Squire*, (1906) 5 L. G. R. 99.

(*y*) *Ball* v. *Ray*, 8 Ch. 467; 21 W. R. 282; *Gullick* v. *Tremlett*, 20 W. R. 35; *Broder* v. *Saillard*, 2 C. D. 692; 45 L. J. Ch. 214.

(*z*) *Barham* v. *Hodges*, (1876) W. N. 234.

(*a*) *May* v. *Stoop*, (1909) 25 T. L. R. 635.

(*b*) *Bostock* v. *North Staffordshire Railway Co.*, 5 De G. & Sm. 584; 3 Sm. & G. 283; 25 L. J. Ch. 325; 90 R. R. 159.

(*c*) *Dewar* v. *City and Suburban Racecourse Co.*, (1899) 1 Ir. R. 345; see as to rabbit coursing, *Oyers* v. *Hanson*, (1912) 56 S. J. 735; W. N. 193.

(*d*) *Wedmore* v. *Mayor of Bristol*, 11 W. R. 136; *Dewar* v. *City and Suburban Racecourse Co.*, *supra*.

(*e*) *Barber* v. *Penley*, (1893) 2 Ch. 447; 62 L. J. Ch. 623; *Wagstaff* v. *Edison Bell Co.*, (1893) 10 T. L. R. 80; *Lyons & Co.* v. *Gulliver and the Capital Syndicate*, (1913) 29 T. L. R. 428.

(*f*) *Dover Gaslight Co.* v. *Mayor of Dover*, 5 De G. M. & G. 545. See *Queen* v. *Longton Gas Co.*, 2 El. & El. 651; 29 L. J. M. C. 118.

(*g*) *Robinson* v. *London General Omnibus Co.*, (1910) 26 T. L. R. 233.

and business from noise so great as to be almost intolerable, the Court granted an injunction against the continuance of the noise, and awarded the plaintiff damages in respect of the past injury (*h*).

Prescriptive right to cause nuisance.

The right to make a noise so as to annoy a neighbour may be acquired by user or long enjoyment, but the right cannot be supported by user unless during the period of user the noise has amounted to an actionable nuisance (*i*). User which is neither physically capable of prevention by the owner of the servient tenement nor actionable, cannot support an easement (*k*). In a case where a confectioner had for more than twenty years used a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt as a nuisance and not complained of; and a few years before bringing the action the physician erected a consulting-room at the end of his garden, and then the noise and vibration became a nuisance to him; it was held that the defendant had not acquired a right to an easement of making a noise and vibration, and an injunction was granted to restrain him (*l*).

The fact that noise and vibration from machinery has not been complained of for more than twenty years does not deprive a neighbour of his right to prevent an increase of noise and vibration, even though such increase be slight (*m*), if the addition to the pre-existing noise amounts to a serious interference with the comfortable enjoyment of his property (*n*).

Coming to a nuisance.

The doctrine of coming to a nuisance (*o*) is exploded (*p*). A man is not precluded from maintaining an action or a suit

(*h*) *Gilling* v. *Gray*, (1910) 27 T. L. R. 39.

(*i*) *Crump* v. *Lambert*, 3 Eq. p. 413; 15 W. R. 417; *Ball* v. *Ray*, 8 Ch. p. 471; 21 W. R. 282; *Sturges* v. *Bridgman*, 11 C. D. 852; 48 L. J. Ch. 785; *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. p. 712; 73 L. J. Ch. 275.

(*k*) *Sturges* v. *Bridgman*, *supra*.

(*l*) Ib. See *Hollins* v. *Verney*, 13 Q. B. D. p. 309; 53 L. J. Q. B. 430.

(*m*) *Heather* v. *Pardon*, 37 L. T. 393; *Sturges* v. *Bridgman*, 11 C. D. p. 859; 48 L. J. Ch. 785.

(*n*) *Rushmer* v. *Polsue and Alfieri*, (1906) 1 Ch. p. 237; affirmed, *sub nom. Polsue and Alfieri* v. *Rushmer*, (1907) A. C. 121; 76 L. J. Ch. 365.

(*o*) See 2 Bl. Comm. 402.

(*p*) *Att.-Gen.* v. *Manchester Corporation*, (1893) 2 Ch. p. 95; 62 L. J. Ch. 459.

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by the fact that the business which creates the nuisance had been carried on before he took possession (*q*).

Right of drain and drip.

An interference with the right of drain is a nuisance to a house. If the owner of a house, being also owner of land surrounding it, makes a drain or conduit through part of the land to his house, and then sells the house with its appurtenances, the right to the conduit passes under the conveyance as a thing appertaining to the house. The right, however, is restricted to a reasonable use for the purpose of the house in the condition in which it was when the grant was made (*r*).

As between the occupiers of adjoining houses, the occupier who is bound to receive sewage passing in a drain under his house and from thence to other premises, is bound to keep the sewage from passing from his own premises to such other premises otherwise than along the accustomed channel; and this duty is independent of negligence on his part, and independent of his knowledge or ignorance of the existence of the drain (*s*). But if the drain is a public sewer so that the occupier of the house which is bound to receive the sewage is not liable for its condition, he is not liable for an escape of sewage to the premises of his neighbour (*t*).

The same principles which apply to the right of drain are also applicable to the right of drip, or the right to the flow of water from the roof of one man's house on to the house or land of another. The owner of the dominant tenement may lessen the burden of the servient tenement, but he cannot increase it without the consent of its proprietor. Without such consent he cannot increase the surface of his roof or permit the water from neighbouring roofs to increase that which naturally falls from his own (*u*).

(*q*) *Elliotson* v. *Feetham*, 2 Bing. N. C. 134; 42 R. R. 557; *Bliss* v. *Hall*, 4 Bing. N. C. 183; 7 L. J. (N. S.) C. P. 122; 44 R. R. 697; *Tipping* v. *St. Helen's Smelting Co.*, 1 Ch. 66, and see *Crump* v. *Lambert*, 3 Eq. p. 413; 15 W. R. 417; *Sholto Iron Co.* v. *Inglis*, 7 A. C. 528.

(*r*) *Wood* v. *Saunders*, 10 Ch. 582; affirming 44 L. J. Ch. 514; and see *Milner's Safe Co.* v. *Great Northern Railway Co.*, (1907) 1 Ch. p. 222; 76 L. J. Ch. 99.

(*s*) *Humphries* v. *Cousins*, 2 9 C. P. D. 23; 46 L. J. C. P. 442, and see *Holland* v. *Lazarus*, (1897) 66 L. J. Q. B. 285.

(*t*) *Humphries* v. *Cousins*, *supra*.

(*u*) See *Thomas* v. *Thomas*, 2 Cr. M. & R. 34; 4 L. J. (N. S.) Ex.

SECTION 3.—NUISANCES TO SUPPORT.

Support of land "in its natural state."

THE right to the support of land in its natural state, vertically by the subjacent strata, and laterally by the adjacent soil, is a right to which the owner of the surface is of common right *primâ facie* entitled (*x*). The right is not in the nature of an easement, but is an incident to the right of the ordinary enjoyment of property (*y*). The right is not a right to have the whole or any part of the subjacent or adjacent soil left in its natural state, but is simply a right to have the surface supported in its natural state, so far as the subjacent or adjacent soil is naturally capable of affording support. The owner of the subjacent or adjacent soil may work or dig on his own land in any way or to any extent he pleases, so long as he does not cause the surface of his neighbour's soil to subside or give way. He may, if an artificial support be substituted, excavate his land to such an extent as, but for the artificial support, would cause a subsidence of the neighbouring land. Until the ordinary enjoyment of the surface is interfered with no cause of action arises, for the right of the owner is, not that the substance supporting his soil shall not be removed, but that the enjoyment of his land be not disturbed by the removal of its support (*z*), and when actual

179; 41 R. R. 678; *Fay* v. *Prentice*, 1 C. B. 828; 14 L. J. C. P. 298; 68 R. R. 823; *Harvey* v. *Walters*, 8 C. P. p. 162; 42 L. J. C. P. 105; and see *Tucker* v. *Newman*, 11 A. & E. 40; 9 L. J. (N. S.) Q. B. 1; 52 R. R. 276.

(*x*) *Humphries* v. *Brogden*, 12 Q. B. p. 744; 20 L. J. Q. B. 10; 76 R. R. 402; *Hunt* v. *Peake*, 1 John. 705; 29 L. J. Ch. 785; *Rowbotham* v. *Wilson*, 8 H. L. C. 348, 355; 30 L. J. Q. B. 49; *Roberts* v. *Haines*, 6 E. & B. 643; 7 E. & B. 625; 27 L. J. Ex. 49; *New Sharlston Collieries Co.* v. *Earl of Westmoreland*, (1904) 2 Ch. p. 446 (n.); 73 L. J. Ch. 338 (n.); *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co.*, (1906) A. C. pp. 309, 317; 75 L. J. Ch. 541; *Butterley Co.* v. *New Hucknall Colliery Co.*, (1909) 1 Ch. 37, 51; 78 L. J. Ch. 63; (1910) A. C. 385; 79 L. J. Ch. 411; *London and North Western Railway Co.* v. *Howley Park Coal Co.*, (1911) 2 Ch. p. 110; 80 L. J. Ch. 537; (1913) A. C. p. 25; 82 L. J. Ch. 76. See, as to the *primâ facie* right to support being affected by contract, statute, or custom, *post*, pp. 212 *et seq.*

(*y*) *Backhouse* v. *Bonomi*, 9 H. L. C. p. 512; 34 L. J. Q. B. 181; *Dalton* v. *Angus*, 6 A. C. p. 809; 50 L. J. Q. B. 689; *West Leigh Colliery Co.* v. *Tunnicliffe & Co.*, (1908) A. C. p. 30; 77 L. J. Ch. 102.

(*z*) *Backhouse* v. *Bonomi*, 9 H. L. C.

damage occurs by the removal of the support neither the care and skill with which the works may have been carried on, nor the unstable nature of the soil, nor the difficulty of propping it up, will form any defence to an action (*a*). The Statute of Limitations runs from the date of the subsidence (*b*), and if there are successive subsidences caused by the same excavation, each subsidence gives rise to a fresh right of action (*c*). The right to support exists as well in the case of lands which are not conterminous as of lands which are conterminous. Any land which depends mediately or immediately on the support of other land, and is capable of being injured by its removal, is for this purpose neighbouring land (*d*).

An overlying seam in a mine has the same right of support from below that the surface has (*e*).

The right of support is however limited to a right of support from land in its natural state to land in its natural state. If the support required is increased, either by increasing the weight of the supported land, or by diminishing its self-supporting power, no right exists in the absence of prescription or grant, to have this additional support supplied by the neighbouring land, and no subsidence resulting from this cause gives a right of action (*f*). If by the action of a landowner

503; 34 L. J. Q. B. 181; *Att.-Gen.* v. *Conduit Colliery Co.*, (1895) 1 Q. B. 301, 312; 64 L. J. Q. B. 207.

(*a*) See *Humphries* v. *Brogden*; *Hunt* v. *Peake*, *supra*; *Att.-Gen.* v. *Conduit Colliery Co.*, (1895) 1 Q. B. p. 311; 64 L. J. Q. B. 207; *The Trinidad Asphalte Co.* v. *Ambard*, (1899) A. C. 594, 602; 68 L. J. P. C. 114; *West Leigh Colliery Co.* v. *Tunnicliffe & Co.*, (1908) A. C. p. 29; 77 L. J. Ch. 102. See, as to form of order restraining working, removing, or injuring the pillars left for the support of roofs in coal mines, *Mostyn* v. *Lancaster*, 23 C. D. p. 625; 52 L. J. Ch. 848.

(*b*) *Backhouse* v. *Bonomi*; *West Leigh Colliery Co.* v. *Tunnicliffe & Co.*, *supra*.

(*c*) *Darley Main Colliery Co.* v. *Mitchell*, 11 A. C. 127; 55 L. J. Q. B. 529; *Crumbie* v. *Wallsend Local Board*, (1891) 1 Q. B. 503; 60 L. J. Q. B. 392; *West Leigh Colliery Co.* v. *Tunnicliffe & Co.*, (1908) A. C. p. 29; 77 L. J. Ch. 102.

(*d*) *Browne* v. *Robins*, 4 H. & N. 186; 28 L. J. Ex. 250; *Birmingham Corporation* v. *Allen*, 6 C. D. 284; 46 L. J. Ch. 676; see *Howley Park Coal Co.* v. *London and North Western Railway Co.*, (1913) A. C. p. 25; 82 L. J. Ch. p. 80.

(*e*) *Butterley Co.* v. *New Hucknall Colliery Co.*, (1910) A. C. p. 386; 79 L. J. Ch. 411.

(*f*) *Partridge* v. *Scott*, 3 M. & W.

whose land intervenes between the lands of two other proprietors, the right of support to which one of these landowners is entitled is affected, he cannot as against the other landowner claim a greater right of support than he would have been entitled to, had the land of the intervening owner been left in its natural state (*g*).

Support of land in its natural state

The right of support from land being a right to support from land in its natural state to land in its natural state, the right includes only the right to such support as is furnished by the permanent conditions of land, not by its accidental circumstances (*h*). The existence of water in a drowned mine being obviously a circumstance of an accidental and temporary character, a mine owner may drain it away, provided he works his mines in the ordinary and usual manner, although it may contribute to the support of the soil above. No right to resist the withdrawal of the water can be gained by prescription (*i*). So also, it seems that as a general rule, an adjoining owner may drain his soil of water, if for any reason it becomes necessary or convenient for him to do so, even though the result of doing so may be to cause a subsidence of the soil of his neighbour (*k*). So also, in a recent case (*l*), the defendants were held not liable for the subsidence of the plaintiffs' surface caused by the defendants pumping up brine from their mine, in doing which they also drew off some brine from the plaintiffs' mines. Where, however, a plaintiff's land was supported, not by water but in one case by a bed of wet sand or running silt (*m*), and in another

220; 7 L. J. (N. S.) Ex. 101; 49 R. R. 578, and see *Dalton* v. *Angus*, 6 A. C. p. 740; 50 L. J. Q. B. 689.

(*g*) *Mayor, etc., of Birmingham* v. *Allen*, 6 C. D. 284; 46 L. J. Ch. 673.

(*h*) *Elliott* v. *North Eastern Railway Co.*, 1 J. & H. 145; 2 De G. F. & J. 423; 30 L. J. Ch. 160; 10 H. L. C. 333; 32 L. J. Ch. 402.

(*i*) Ib.

(*k*) *Popplewell* v. *Hodgkinson*, L. R. 4 Ex. 249; 38 L. J. Ex. 126; *English* v. *Metropolitan Water Board*, (1907) 1 K. B. p. 602; 76 L. J. K. B. 361.

(*l*) *Salt Union* v. *Brunner Mond & Co.*, (1906) 2 K. B. 822; 76 L. J. K. B. 55; and see the Brine Pumping (Compensation for Subsidence) Act, 1891 (54 & 55 Vict. c. 40).

(*m*) *Jordeson* v. *Sutton, etc., Gas Co.*, (1899) 2 Ch. 217; 68 L. J. Ch. 457; and see *Fletcher* v. *Birkenhead Corporation*, (1907) 1 K. B. p. 208; 77 L. J. Ch. 218.

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case by pitch (*n*), and the defendants had caused the plaintiff's land to subside by withdrawing the support afforded by the wet sand and pitch, it was held that an actionable nuisance had been committed.

Support for houses and buildings

The right to support of land and the right to support of buildings on land stand upon a different footing as to the mode of acquiring them, the former being a right of property analogous to the flow of a natural stream or of air, whilst the latter is an easement and is founded upon prescription or grant, express or implied: but the character of the rights when acquired, is in each case the same (*o*).

Right acquired by twenty years' enjoyment.

A right to lateral support from the adjoining soil may be acquired for a building which has enjoyed that support peaceably and without interruption for the prescriptive period of twenty years. The rule is the same where a building has been enlarged or pulled down and a building of an entirely different character has been built upon the land. The right to support of the new or enlarged building is established after a peaceable and uninterrupted enjoyment of support for twenty years, and an action will lie against the owner of the adjoining land if he disturbs his land so as to take away the right of lateral support, previously afforded to the land (*p*). So also a house which has stood for twenty years acquires a right to vertical support (*q*). But to establish a right to support by long enjoyment, it must be shown that the owner of the servient tenement knew or had the means of knowing that his house was affording support to the other (*r*).

Right of support to land arising by implication upon severance.

A right to support of soil in excess of the ordinary common law right, arises by implication of law, where the owner of land has granted the surface, reserving to himself the subjacent minerals, or has granted any part of his land, retaining the adjoining part. As a grant of property carries with it

(*n*) *Trinidad Asphalt Co.*, (1899) A. C. 594; 68 L. J. P. C. 114.

(*o*) *Backhouse* v. *Bonomi*, E. B. & E. 655, *per* Willes, J.; *Dalton* v. *Angus*, 6 A. C. pp. 792, 809; 50 L. J. Q. B. 689.

(*p*) *Dalton* v. *Angus*, *supra*; *Humphries* v. *Brogden*, 12 Q. B. 749; 20 L. J. Q. B. 10; 76 R. R. 402.

(*q*) *Bell* v. *Love*, 10 Q. B. D. 548, 571; 52 L. J. Q. B. 290; *Love* v. *Bell*, 9 A. C. 286; 53 L. J. Q. B. 257.

(*r*) *Tone* v. *Preston*, 24 C. D. 739; 53 L. J. Ch. 50; *Union Lighterage*

all legal incidents which are necessary for the reasonable enjoyment of the property in the state in which it was at the time of the grant or which are necessary for the purposes for which, according to the obvious intent of the parties, the grant was made, such a measure of support, adjacent and subjacent, as is necessary for the land in the condition it was at the time of the grant or in the state for the purpose of putting it into which the grant was made, passes as an incident to the grant (*s*). When accordingly a man grants a house, retaining the adjoining soil, the right of support from the adjoining soil passes by implication of law as being necessary and essential for the enjoyment of the house (*t*). So also where a man conveys land for the express purpose that buildings may be erected thereon, there is *primâ facie* the grant of a right to have not only the surface of the land in its natural state, but the buildings to be erected thereon supported by the adjacent and subjacent minerals reserved to the grantor by the deed (*u*).

Implied right of support—when qualified.

The implied grant, arising upon the sale of a plot of land for building purposes, of the right to lateral support from adjoining land retained by the vendor, will be qualified where the purchaser is aware that the vendor intends to build on the land reserved; *e.g.*, where the land sold forms part of a building estate. In such a case, it seems that the vendor may excavate upon the adjoining land in a reasonable and proper manner to carry out his building works (*x*). But if, by build-

Co. v. *London Graving Dock Co.*, (1901) 2 Ch. 300; 70 L. J. Ch. 558; (1902) 2 Ch. 557; 71 L. J. Ch. 791.

(*s*) *Caledonian Railway Co.* v. *Sprot*, 2 Macq. 461; *Elliott* v. *North Eastern Railway Co.*, 10 H. L. C. 333; 32 L. J. Ch. 402; *Proud* v. *Bates*, 34 L. J. Ch. 412; *Hext* v. *Gill*, 7 Ch. 700; 41 L. J. Ch. 761; *Rigby* v. *Bennett*, 21 C. D. 559, 567; 31 W. R. 222; *London and North Western Railway Co.* v. *Evans*, (1893) 1 Ch. p. 27; 62 L. J. Ch. 1; *Great Western Railway Co.* v. *Cefn Cribbwr Brick Co.*, (1894) 2 Ch. p. 164; 63 L. J. Ch. 500; *Jary* v. *Barnsley Corporation*, (1907) 2 Ch. p. 613; 76 L. J. Ch. 593; *Jones* v. *Pritchard*, (1908) 1 Ch. p. 636; 77 L. J. Ch. 405.

(*t*) *Dalton* v. *Angus*, 6 A. C. p. 826; 50 L. J. Q. B. 689.

(*u*) *Aspden* v. *Seddon*, 10 Ch., p. 401; 44 L. J. Ch. 359; *Siddons* v. *Short*, 2 C. P. D. 572; 46 L. J. Ch. 795; and see *Jary* v. *Barnsley Corporation*, (1907) 2 Ch. p. 613; 76 L. J. Ch. 593.

(*x*) *Rigby* v. *Bennett*, 21 C. D.

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ing operations, the vendor (or a purchaser of any part of the land reserved) lets down the house of the first purchaser, he will be liable, provided that he could have built in a reasonable way without inflicting the injury (*y*).

Right of support as between adjoining houses.

As between two adjoining houses belonging to different owners, a right to lateral support can be acquired by long enjoyment (*z*), or under the provisions of the Prescription Act (*a*), but the enjoyment must be of right and not "clam" (*b*). So, also, if a building is divided into floors separately owned, the owner of each upper floor or flat is entitled to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself (*c*). Where also houses have been so constructed as to be mutually subservient to and depending on each other, neither of them being capable of standing or being enjoyed without the support it derives from its neighbour, the alienation of one house by the owner of both does not estop him from claiming in respect of the house he retains that support from the house sold which is at the same time afforded in return by the former to the latter tenement (*d*).

Although no right to support may exist as between adjoining houses or buildings, a man who takes down his house must use due care and skill, and take reasonable and proper precau-

559; 31 W. R. 222; and see *Birmingham, Dudley, etc., Banking Co.* v. *Ross*, 38 C. D. 295; 57 L. J. Ch. 106; *Broomfield* v. *Williams*, (1897) 1 Ch. pp. 613, 616; 66 L. J. Ch. 305; *Frederick Betts & Co.* v. *Pickford & Co.*, (1906) 2 Ch. pp. 93, 94; 75 L. J. Ch. 483; *Browne* v. *Flower*, (1911) 1 Ch. p. 225; 80 L. J. Ch. p. 184.

(*y*) *Rigby* v. *Bennett*, *supra*; and see *Grosvenor Hotel Co.* v. *Hamilton*, (1894) 2 Q. B. pp. 841, 842; 63 L. J. Q. B. 661.

(*z*) *Dalton* v. *Angus*, 6 A. C., p. 802; 50 L. J. Q. B. 689; *Love* v. *Bell*, 9 A. C. 286; 53 L. J. Q. B. 257; *Union Lighterage Co.* v. *London Graving Dock Co.*, (1901) 2 Ch. p. 305; 70 L. J. Ch. 558.

(*a*) *Lemaitre* v. *Davis*, 19 C. D. 281; 51 L. J. Ch. 173.

(*b*) *Tone* v. *Preston*, 24 C. D. pp. 742, 743; 53 L. J. Ch. 50; *Union Lighterage Co.* v. *London Graving Dock Co.*, (1901) 2 Ch. 300; 70 L. J. Ch. 558; (1902) 2 Ch. 557; 71 L. J. Ch. 791.

(*c*) *Dalton* v. *Angus*, 6 A. C. p. 793; 50 L. J. Q. B. 689.

(*d*) *Richards* v. *Rose*, 9 Exch. 218, 221; 23 L. J. Ex. 3; *Jones* v. *Pritchard*, (1908) 1 Ch. p. 636; 77 L. J. Ch. 405; cf. *Howarth* v. *Armstrong*, 77 L. T. 62.

tions in pulling down his wall, and he is not bound to find a substitute or equivalent for the support which he has a right to remove. An action, however, will lie if the wall be pulled down so carelessly, negligently, and unskilfully as to cause damage to the adjacent house or buildings (*e*). The owner of the premises adjoining those pulled down must shore up his own on the inside, and do everything proper to be done upon them for their protection. If, however, the pulling down be irregularly and improperly done, and injury is caused thereby, the person so acting may be liable for it, although the owner of the premises injured may not have done all he ought for his own protection (*f*).

The mere circumstance of juxta-position does not render it necessary for a person who pulls down a wall to give notice of his intention to the owner of an adjoining wall (*g*); nor if he is ignorant of the existence of the adjoining wall—as where it is underground—is he bound to use extraordinary care in pulling down his own (*h*). If he gives notice of his intention to pull down his wall to the owner of the adjoining premises, he is not bound to use any extraordinary care in preventing an injury to the adjoining premises, although, from the peculiar nature of the soil, he may be compelled to lay the foundation of his new buildings several feet deeper than that of the old ones (*i*).

Party wall.

A party wall is a wall standing on the line between two estates owned by different owners for the use of both estates. The common use of a wall separating adjoining lots of land belonging to different owners is *primâ facie* evidence that the wall and the land on which it stands belong to both owners in equal undivided moieties as tenants in common (*k*). A wall

(*e*) *Walters* v. *Pfeil*, Moo. & M. 363; *Brown* v. *Windsor*, 1 Cr. & J. 26; *Trower* v. *Chadwick*, 3 Bing. N. C. 334; 6 L. J. (N. S.) C. P. 47; 43 R. R. 659; 6 Bing. N. C. 1; 8 L. J. (N. S.) Ex. 286; *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*, (1898) 2 Ch. pp. 612, 613; 67 L. J. Ch. 657.

(*f*) *Walters* v. *Pfeil*, Moo. & M. 363.

(*g*) *Trower* v. *Chadwick*, 6 Bing. N.C. 1; 8 L. J. Ex. 286; 43 R. R. 659.

(*h*) Ib. See *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*, (1898) 2 Ch. pp. 612, 613; 67 L. J. Ch. 657.

(*i*) *Massey* v. *Goyder*, 4 C. & P. 161; 34 R. R. 782.

(*k*) *Matts* v. *Hawkins*, 5 Taunt.

may be a party wall to such a height as it belongs in common to two buildings, and may be an external wall for the rest of its height (*l*). One of the tenants in common may take down the wall, if it be done with the intention of rebuilding it (*m*), but it must be with that intention (*n*). Where an owner of a house grants a divided moiety of an outside wall, with the intention of making such wall a party wall between his house and an adjoining house to be built by the grantee, the law implies the grant and reservation in favour of the grantor and grantee respectively of such easements as may be necessary to carry out the common intention of the parties with regard to the user of the wall. Accordingly, if it is within the contemplation of the parties that the grantee shall support the roof of the house he intends to build upon the moiety of the wall comprised in his grant, the other moiety of the wall will be subject to an easement of lateral support for the benefit of the roof when erected, and similarly the grantee's moiety of the wall will pass to him subject to the easement of lateral support for the benefit of the grantor's roof if supported by his half of the wall (*o*).

The law on the subject of party walls in the Metropolis is now governed by the London Building Act, 1894 (*p*), which

20; 14 R. R. 695; *Cubitt* v. *Porter*, 8 B. & C. 257; 32 R. R. 374; *Watson* v. *Gray*, 14 C. D. p. 195; 49 L. J. Ch. 243; *Mason* v. *Fulham Corporation*, (1910) 1 K. B. p. 637; 79 L. J. K. B. 385.

(*l*) *Weston* v. *Arnold*, 8 Ch. 1084; 43 L. J. Ch. 123; *Drury* v. *Army and Navy Co-operative Supply Co.*, (1896) 2 Q. B. 271; 65 L. J. M. C. 169. See *Frederick Betts & Co.* v. *Pickford & Co.*, (1906) 2 Ch. pp. 93, 96; 75 L. J. Ch. 483; and *London, Gloucestershire, etc., Dairy Co.* v. *Morley*, (1911) 2 K. B. 257; 80 L. J. K. B. 908.

(*m*) *Cubitt* v. *Porter*, 8 B. & C. 257; 32 R. R. 374; *Standard Bank, etc.* v. *Stokes*, 9 C. D. 68; 47 L. J. Ch. 554. See as to the duty of person taking down a party wall to see that reasonable skill is exercised, *Hughes* v. *Percival*, 8 A. C. 443; 52 L. J. Q. B. 719; *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*, (1898) 2 Ch. pp. 612, 613; 67 L. J. Ch. 657.

(*n*) *Stedman* v. *Smith*, 8 E. & B. 1; 26 L. J. Q. B. 314. See *Colbeck* v. *Girdlers Co.*, 1 Q. B. D. p. 242; 45 L. J. Q. B. 225.

(*o*) *Jones* v. *Pritchard*, (1908) 1 Ch. pp. 635, 636; 77 L. J. Ch. 405.

(*p*) 57 & 58 Vict. c. ccxiii. Part viii. See *Lewis & Solome* v. *Charing Cross and Euston Railway Co.*, (1906) 1 Ch. p. 516; 75 L. J. Ch. 282. As to definition of party wall, see sects. 5 (16), 58.

regulates the relations between building owners and adjoining owners whose property is separated by a party wall, whether the wall is one of which they are tenants in common or not (*q*).

Protection of right to support by injunction.

An owner's right to support will be protected by an injunction (*r*), when the interference with the right is of a substantial nature even though the pecuniary loss actually resulting from the defendant's wrongful acts is small (*s*). The Court will also interfere by injunction before subsidence has actually taken place if satisfied that injury is imminent and certain to result from the defendant's acts (*t*), also when the defendant claims the right to do acts which must inevitably cause a subsidence (*u*); when the subsidence is serious, a plaintiff will not be deprived of his legal right to an injunction because the result of the order may be to close the defendant's works (*x*).

An injunction to restrain the working of mines in such a way as to let down the surface, will not be granted upon an

(*q*) *Lewis & Solome* v. *Charing Cross and Euston Rail...y Co.*, *supra*.

(*r*) See *Dugdale* v. *Robertson*, 3 K. & J. p. 701; 112 R. R. 349; *Hunt* v. *Peake*, Joh. p. 705; 29 L. J. Ch. 785; *Proud* v. *Bates*, 34 L. J. Ch. p. 312; *Hext* v. *Gill*, 7 Ch. p. 718; 41 L. J. Ch. p. 767; *New Sharlston Collieries Co.* v. *Earl of Westmoreland*, (1904) 2 Ch. p. 445 (n); 82 L. T. 725 (H. L.); *Bishop Auckland Industrial Co.* v. *Butterknowle Colliery Co.*, (1904) 2 Ch. pp. 430, 440; 73 L. J. Ch. 335, 635: affirmed (1906) A. C. 305; 75 L. J. Ch. 541; *Manchester Corporation* v. *New Moss Colliery Co.*, (1906) 2 Ch. 564; 75 L. J. Ch. 772; (1908) A. C. 117; 77 L. J. Ch. 392; *London and North Western Railway Co.* v. *Howley Park Coal Co.*, (1911) 2 Ch. pp. 110, 111; 80 L. J. Ch. 537; (1913) A. C. 11; 82 L. J. Ch. 76.

(*s*) *Siddons* v. *Short*, 2 C. P. D., p. 577; 46 L. J. C. P. 795; *Att.-Gen.* v. *Conduit Colliery Co.*, (1895) 1 Q. B. p. 313; 64 L. J. Q. B. 207; *Trinidad Asphalt Co.* v. *Ambard*, (1899) A. C. p. 600; 68 L. J. P. C. 114; *New Sharlston Collieries Co.* v. *Earl of Westmoreland*, (1904) 2 Ch. p. 445 (n); 79 L. T. 716; 82 L. T. 725 (H. L.).

(*t*) *Siddons* v. *Short*, 2 C. P. D. p. 577; 46 L. J. C. P. 795; *Birmingham Corporation* v. *Allen*, 6 C. D. p. 287; 46 L. J. Ch. 673; *Darley Main Colliery Co.* v. *Mitchell*, 11 A. C. p. 145; 55 L. J. Q. B. 529.

(*u*) *Proud* v. *Bates*, 34 L. J. Ch., p. 412; *Hext* v. *Gill*, 7 Ch. pp. 711, 712; 41 L. J. Ch. 761; and see *Att.-Gen.* v. *Conduit Colliery Co.*, (1895) 1 Q. B., p. 314; 64 L. J. Q. B. 207.

(*x*) *Earl of Westmoreland* v. *New Sharlston Collieries Co.*, 79 L. T., p. 722; see *Trinidad Asphalt Co.* v. *Ambard*, (1899) A. C. p. 602; 68 L. J. P. C. 114.

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interlocutory application, except in the clearest case, on account of the serious injury which might result from stopping the working of a mine even for a short time (*y*).

Primâ facie right to support qualified by instrument severing title to surface and mines.

The *primâ facie* right of the owner of the surface to support, may be qualified or waived by the instrument, or Act of Parliament regulating the respective rights of the owners of the surface and of the mines, so as to give the mine owner the right to work his mines in such a way as to let down the surface, but to exclude the right to support the language of the instrument, whether it be a deed of grant or reservation, or lease, or Act of Parliament, or award, must unequivocally convey that intention, either by express words, or by necessary implication (*z*). The same presumption in favour of a right to support which regulates the rights of the parties in the absence of an instrument defining them will apply also in construing the instrument (*a*). To exclude the presumption in favour of the right to support, it is not enough that mining rights have been reserved or granted in very wide terms, or that powers and privileges usually found in mining grants are conferred without stint, nor is it enough in the case of a lease, that the lessee is bound to work out the minerals, or to work the minerals in a prescribed manner, or in the case of an inclosure Act or award, that the lord, in whose favour the mines are reserved or regranted, is authorised to work the minerals and enjoy the property as fully and freely as if the inclosure Act had not been passed, nor is it enough to

(*y*) *Hilton* v. *Earl Granville*, Cr. & L. p. 297; 10 L. J. Ch. 398; 54 R. R. 297.

(*z*) *Rowbotham* v. *Wilson*, 8 H. L. C. p. 366; 30 L. J. Q. B. 49; *Davis* v. *Treharne*, 6 A. C. 467; 50 L. J. Q. B. 665; *Bell* v. *Love*, 10 Q. B. D. pp. 558; 52 L. J. Q. B. 290; 9 A. C. 286; 53 L. J. Q. B. 257; *New Sharlston Collieries Co.* v. *Earl of Westmoreland*, (1904) 2 Ch. 443 (n.); 73 L. J. Ch. 338 (n.) (H. L.); *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co.*, (1906) A. C., pp. 309, 313; 75 L. J. Ch. 541; *Butterley Co.* v. *New Hucknall Colliery Co.*, (1909) 1 Ch. pp. 48, 49; 79 L. J. Ch. 63; (1910) A. C. pp. 385, 386; 79 L. J. Ch. 411. See *Brewer* v. *Rhymney Iron Co.*, (1910) 1 Ch. 766; 79 L. J. Ch. 334. As to power of a tenant for life of settled land to grant a lease with right to let down the surface by mining, see *Sitwell* v. *Earl of Londesborough*, (1905) 1 Ch. 460; 74 L. J. Ch. 254.

(*a*) *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co.*, *supra*.

Compensation clause.

exclude the presumption, that compensation is provided in a measure adequate or more than adequate to cover any damage likely to be occasioned by the exercise of the powers and privileges conferred on the mine owner (*b*). But although a provision for compensation is not of itself sufficient to show that the mine owner working in the usual and proper way is at liberty to let down the surface, the absence of any provision for compensation is some indication that the ordinary rights of the surface owner were intended to be left untouched, and the presence of a provision for compensation, which is obviously inadequate or plainly inappropriate if applied to damage by subsidence, is cogent evidence to prove that subsidence was not contemplated (*c*). Accordingly, where there was a proviso in a mining lease that the lessee of the mines should have liberty to enter upon the land and carry away the minerals and do all such acts in or under the demised premises as should be necessary or convenient for working and carrying away the minerals, making compensation for all damage occasioned by the exercise of the rights thereby reserved, it was held that the mine owner might not work the mines so as to let down the surface (*d*). So also where it was provided by an inclosure Act that the mine owner should work the mines, making satisfaction for the damage occasioned thereby to the owner of a freehold allotment on the surface at the rate of 5*l*. yearly during the working of the mines, it was held that he had no right to let down the surface (*e*). So, also, where before the year 1757 the lords of a manor had the right to work the mines under the waste lands of the manor and to let down the surface, provided enough pasturage was left for the commoners, and by an Inclosure Act of 1757 the waste lands were inclosed and allotted, and the lord of the manor was empowered to work the mines as fully as before the Act without making or paying any satisfaction for so doing, the damage caused to an allottee by such working to be borne and distri-

Absence of compensation clause, or inadequate provision for subsidence.

(*b*) *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co.*, (1906) A. C. p. 313; 75 L. J. Ch. 541.

(*c*) *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co.*, (1906) A. C. p. 314; 75 L. J. Ch. 541.

(*d*) *Davis* v. *Treharne*, 6 A. C. 460; 50 L. J. Q. B. 665.

(*e*) *Love* v. *Bell*, 9 A. C. 286; 53 L. J. Q. B. 257.

buted among the occupiers of the other allotments, according to their yearly values, it was held that the common law right of the owners of the surface to support of the surface was not taken away, the provision for non-payment of compensation in working being consistent with the working of the mines in the ordinary way and subject to the ordinary right of the surface owners, while the fact that compensation was to be paid by the occupiers of other allotments and not by the owners, supported the construction that the clause did not refer to subsidence of the surface (*f*). If a compensation clause is capable of being satisfied by reference to acts done "on" the surface, then, though it may be wide enough to cover also damage done "to" the surface by taking away the support, still it must be confined to damage done "on" the surface, and the inference that support may be taken away on payment of compensation cannot be made (*g*).

Right to cause subsidence implied.

On the other hand, when it appears from the terms of a lease that the parties intended that a lower seam should be worked, and there is evidence that the system of working contemplated by the parties must of necessity injure the upper seam, but will not destroy it, and that it is impossible to get the minerals at all without letting down the upper seam, in such a case the general common law right of support will be displaced (*h*).

So also the terms of a grant may be such as not deprive the surface owner of his right to support, but of compensation for loss of support (*i*).

Custom as to working mines so as to let down the surface.

A custom or prescription to work mines so as to let down or destroy the surface without making compensation for the injury and damage that may be done, is unreasonable and

(*f*) *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co.*, (1906) A. C. p. 312; 75 L. J. Ch. 541.

(*g*) *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co.*, (1906) A. C., p. 309; 75 L. J. Ch. 541.

(*h*) *Butterley Co.* v. *New Hucknall Colliery Co.*, (1909) 1 Ch. 37; 78 L. J. Ch. 63; (1910) A. C. 381; 79 L. J. Ch. 411; *Locker-Lampson* v. *Staveley Coal and Iron Co.*, (1909) 25 T. L. R. 136.

(*i*) *Williams* v. *Bagnall*, 15 W. R. 273; *Buchanan* v. *Andrew*, L. R. 2 H. L. (Sc.) p. 293; *Gill* v. *Dickinson*, 5 Q. B. D. 159; 49 L. J. Q. B. 262. See *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co.*, (1906) A. C. pp. 321, 322; 75 L. J. Ch. 541.

bad (*k*). But a custom that the lord of a manor may get all the minerals under copyhold lands, paying compensation to a copyhold tenant for any damage he may do to the surface in getting them is good (*l*).

Option reserved to a company to purchase out minerals within a certain distance.

When a proposed undertaking passes through a mineral district, provisions are often inserted in the Act which authorises the undertaking, excepting all minerals under the land taken by the company, but giving the company power, as soon as the workings of the minerals approach within a certain distance of the surface, to stop the workings on purchasing out the rights of the coal owners and paying them compensation for their loss in not being permitted to work them. In *Dudley Canal Co.* v. *Grazebrook* (*m*), the clause which empowered the mine owner to proceed with the workings of the mines in the event of the option to purchase being declined, declared that he might carry them on "provided no injury be done to the navigation." The Court said that the meaning of the proviso could not be that the owners were to be responsible at all events for any injury done to the canal, for then the company would never purchase the minerals; that the reasonable mode of reconciling the different parts of the Act was to say "either that the party working the mines was to do no unnecessary damage or injury to the navigation, or no extraordinary damage or injury by working them out of the ordinary mode" (*n*).

Subsidence caused by excavations of predecessor in title.

It has been decided that the owner, or lessee, of minerals, is not liable for damage to neighbouring land or buildings by

(*k*) *Hilton* v. *Lord Granville*, 5 Q. B. 701; 13 L. J. Q. B. 193; 64 R. R. 604; *Blackett* v. *Bradley*, 1 B. & S. 940; 31 L. J. Q. B. 65; 124 R. R. 815; *Bell* v. *Love*, 10 Q. B. D., p. 561; 52 L. J. Q. B. 290. See *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co.*, (1906) A. C. p. 321; 75 L. J. Ch. 541.

(*l*) *Aspden* v. *Seddon*, 1 Ex. D., p. 510; 46 L. J. Ex. 353.

(*m*) 1 B. & Ad. 59; 8 L. J. K. B. 361; 35 R. R. 212. Cf. *Knowles & Co.* v. *Lancashire and Yorkshire Railway Co.*, 14 A. C. 248; 59 L. J. Q. B 39.

(*n*) See *Stourbridge Canal Co.* v. *Earl of Dudley*, 3 El. & El. 409; 30 L. J. Q. B. 108; 122 R. R. 762; *Chamber Colliery Co.* v. *Rochdale Canal Co.*, (1895) A. C. 564; 64 L. J. Q. B. 645; *New Moss Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Railway* (1897) 1 Ch. 725; 66 L. J. Ch. 381. But see *Knowles* v. *Lancashire and Yorkshire Railway Co.*, *supra*.

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subsidence caused by the working of the minerals by the predecessor in title of such owner or lessee, although the damage occurs after such owner or lessee came into possession (*o*).

Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, ss. 77—79.

General provisions defining the respective rights of mine owners and railway companies have been inserted in the Railways Clauses Consolidation Act, 1845, which Act creates a special law by which the rights of the mine owner and railway company are regulated in respect of mines lying within the forty yards or other prescribed limit of the railway (*p*). In the case of purchases of land by railway companies, the mines being reserved to the vendor, there is no grant by implication of the right to have the surface supported by the subjacent minerals as is implied in the case of a grant to an ordinary purchaser, the mutual rights and obligations of the railway company and vendor with respect to the mines lying within forty yards of the railway, or the other prescribed limit under section 78 of this Act, being regulated by the mining sections 77 to 85 of this Act (*q*). The common law right of support by soil other than minerals is not, however, taken away by the Act even within the forty yards, and the common law right of lateral support outside the forty yards remains, and will be protected by injunction, whether the soil is or is not mineral. Thus in a recent case an injunction was granted restraining a colliery company from working their mines outside the limit of forty yards from the plaintiff's railway line, in such a manner as to withdraw lateral support from the railway (*r*).

Waterworks Clauses Act, 10 & 11 Vict. c. 17, ss. 18—27.

In the case of the purchase of the surface of land by a water

(*o*) *Greenwell* v. *Low Beechburn Coal Co.*, (1897) 2 Q. B. 165; 66 L. J. Q. B. 643; *Hall* v. *Duke of Norfolk*, (1900) 2 Ch. 493; 69 L. J. Ch. 571.

(*p*) 8 & 9 Vict. c. 20, ss. 77—79; *London and North Western Railway Co.* v. *Howley Park Coal Co.*, (1911) 2 Ch. pp. 108, 110; 80 L. J. Ch. 537; (1913) A. C. 11; 82 L. J. Ch. 76. See *Re Earl of Carlisle and Northampton County Council*, (1912) 105 L. T. 799; 10 L. G. R., p. 56.

(*q*) *Great Western Railway Co.* v. *Bennett*, L. R. 2 H. L. 27, 40, 36 L. J. Q. B. 133; *London and North West Railway Co.* v. *Ackroyd*, 31 L. J. Ch. 588; *North British Railway Co.* v. *Budhill Coal and Sandstone Co.*, (1910) A. C. p. 126; 79 L. J. P. C. 31; *London and North Western Railway Co.* v. *Howley Park Coal Co.*, (1911) 2 Ch. 97; 80 L. J. Ch. 537; (1913) A. C. 11; 82 L. J. Ch. 76; *Re Earl of Carlisle and Northampton County Council*, *supra*.

(*r*) *London and North Western Railway Co.* v. *Howley Park Coal Co.*, (1911) 2 Ch. pp. 79, 110; 80

company under its compulsory powers, the grantor reserving the mines, there is no grant by implication of the right to have the surface supported by the subjacent minerals, but the mutual rights and obligations of the company and grantor, with respect to mines within the prescribed limit are regulated by the mining sections of the Waterworks Clauses Act, 1847 (*s*). Where a corporation, not having compulsory powers, purchased by agreement land and the minerals thereunder from A, and the adjacent land from B, who reserved the right to work the mines underneath without making any compensation, it was held that the corporation were entitled to an injunction restraining B's lessees from working the mines either within or without the limit of forty yards from the corporation's waterworks in such a way as to damage the land purchased from A, on the ground that such land having been bought by agreement, the corporation were entitled to the same common law right of lateral support to the land from the minerals under B's land that A had enjoyed, and that this common law right had not been taken away by the Waterworks Clauses Act, 1847 (*t*).

Land purchased by agreement.

An ordinary conveyance of land includes the right to all minerals under the land, but by section 77 of the Railways Clauses Consolidation Act, 1845, mines of coal, ironstone, slate or other minerals under lands purchased by a railway company are excepted out of the conveyance to the company, unless the same shall have been expressly named therein and conveyed thereby. The section is in substance nothing more nor less than a clause enacting that a special rule of construction shall apply to conveyances of land to a railway company inverting the ordinary rules of construction of such conveyances, mines being deemed to be excepted unless expressly named and conveyed (*u*).

Section 77, Railways Clauses Act, 1845.

L. J. Ch. 537; (1913) A. C. 11; 82 L. J. Ch. 76.

(*s*) 10 & 11 Vict. c. 17, ss. 18—27. See *New Moss Colliery Co.* v. *Manchester Corporation*, (1908) A. C., p. 121; 77 L. J. Ch. 392.

(*t*) *New Moss Colliery Co.* v. *Manchester Corporation*, (1908) A. C. 117; 77 L. J. Ch. 392; and see *London and North Western Railway Co.* v. *Howley Park Coal Co.*, (1911) 2 Ch. pp. 124, 130; 80 L. J. Ch. 537.

(*u*) See *Great Western Railway Co.* v. *Carpalla United China Clay*

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The word "mines" in the section includes minerals, whether got by underground, or by open working (*x*).

What is included in term "minerals."

In deciding whether or not particular substances are or are not minerals within the meaning of sect. 77, the test applied by the Court is, are the substances in question "minerals" as understood in the vernacular of the mining and commercial worlds, and of landowners, at the time when the land was purchased? (*y*).

Thus, brick clay forming the surface or subsoil of land (*z*), a bed of clay or common brick earth extending under the surface of the land for a considerable depth (*a*), sandstone as a general rule (*b*), and freestone (*c*), have been held not to be minerals within the meaning of the section. On the other hand limestone (*d*), china clay not part of the ordinary composition of the soil, and occupying only a small fraction of the subsoil (*e*), and seams of fireclay of exceptional character and value for the manufacture of bricks capable of resisting high temperatures (*f*), have been held to be minerals within the

Co., (1910) A. C. 83; 79 L. J. Ch. 117; *London and North Western Railway Co.* v. *Howley Park Coal Co.*, (1911) 2 Ch. pp. 109, 112; 80 L. J. Ch. 537; (1913) A. C. p. 21; 82 L. J. Ch. p. 78.

(*x*) *Midland Railway Co.* v. *Haunchwood Tile Co.*, 20 C. D. 552; 51 L. J. Ch. 778; *Midland Railway Co.* v. *Robinson*, 37 C. D. 387; 57 L. J. Ch. 440; 15 A. C. 19; 59 L. J. Ch. 442; *North British Railway Co.* v. *Budhill Coal and Sandstone Co.*, (1910) A. C. p. 129; 79 L. J. P. C. 31.

(*y*) *Lord Provost of Glasgow* v. *Farie*, 13 A. C. p. 669; 58 L. J. P. C. 33; *North British Railway Co.* v. *Budhill Coal and Sandstone Co.*, (1910) A. C. 127; 79 L. J. P. C. 31; *Caledonian Railway Co.* v. *Glenboig Union Fireclay Co.*, (1911) A. C., p. 299; 80 L. J. P. C. 128; and see *Symington* v. *Caledonian Railway Co.*, (1912) A. C. p. 92; 81 L. J. P. C. 155.

(*z*) *Lord Provost of Glasgow* v. *Farie*, *supra*; *Great Western Railway Co.* v. *Blades*, (1901) 2 Ch. 624; 70 L. J. Ch. 847. See *Skey* v. *Parsons*, (1909) 101 L. T. 103; 25 T. L. R. 768.

(*a*) *Todd Birlestone Co.* v. *North Eastern Railway Co.*, (1903) 1 K. B. 603; 72 L. J. K. B. 337.

(*b*) *North British Railway Co.* v. *Budhill Coal and Sandstone Co.*, (1910) A. C. 116; 79 L. J. P. C. 31.

(*c*) *Symington* v. *Caledonian Railway Co.*, (1912) A. C. 87, 92; 81 L. J. P. C. 155; Freestone may be a mineral, though seldom likely to be so regarded, ib.

(*d*) *Midland Railway Co.* v. *Robinson*, 15 A. C. 19; 59 L. J. Ch. 442.

(*e*) *Great Western Railway Co.* v. *Carpalla United China Clay Co.*, (1909) 1 Ch. 218; 78 L. J. Ch. 105; (1910) A. C. 83; 79 L. J. Ch. 117.

(*f*) *Caledonian Railway Co.* v. *Glenboig Union Fireclay Co.*, (1911) A. C. 290; 80 L. J. P. C. 128.

meaning of the section. In every case it is a question of fact whether the particular substance is, or is not, a mineral (*g*).

Sect. 78 provides that the mines under the line, or within forty yards therefrom, shall not be worked if the company are willing to pay compensation for the minerals to the owner. Before proceeding to work them, the owner is required to give thirty days' notice of his intention to do so to the company, so as to give the company the power of exercising the option. The company may then give a counter-notice of their willingness to pay compensation for the minerals, and if so the mineral owner is not to work them (*h*). The rights given by this section to the railway company are in substitution for the common law right to support, whether vertical or lateral, within the forty yards limit. It is only within that limit that the railway company can claim the right to pay compensation without actually purchasing the minerals. Beyond the forty yards the owner can work without giving the thirty days' notice, and no counter-notice can be given by the company. Compensation payable under the section is only for minerals within the forty yards (*i*). A railway company by paying compensation under the section to a mineral lessee for leaving the minerals under the line, acquires the right to support from such minerals, and the right to restrain the reversioner on the surrender or determination of the lease from working the minerals, without prejudice to any question as to compensation, having regard to the payment already made (*k*).

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By sect. 79 it is enacted that if the company do not Sect. 79.

(*g*) See *North British Railway Co.* v. *Budhill Coal and Sandstone Co.*, (1910) A. C. 116; 79 L. J. P. C. 31; *Symington* v. *Caledonian Railway Co.*, (1912) A. C. p. 93.

(*h*) See *Midland Railway Co.* v. *Robinson*, 37 C. D. 387; 57 L. J. Ch. 440; 15 A. C. 19; 59 L. J. Ch. 142; *North British Railway Co.* v. *Budhill Coal and Sandstone Co.*, (1910) A. C. p. 126; 79 L. J. P. C. 31; *Great Western Railway Co.* v. *Carpalla United China Clay Co.*, (1910) A. C. p. 85; 79 L. J. Ch. 117; *London and North Western Railway Co.* v. *Howley Park Coal Co.*, (1911) 2 Ch. pp. 109, 110, 116; 80 L. J. Ch. 537; (1913) A. C. 11; 82 L. J. Ch. 76.

(*i*) *London and North Western Railway Co.* v. *Howley Park Coal Co.*, *supra*.

(*k*) *Smith* v. *Great Western Railway Co.*, 3 A. C. p. 178; 47 L. J. Ch. 97.

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within thirty days state their willingness to purchase the minerals, the owner may work the mines so that the working be done in a manner proper and necessary for the beneficial working thereof and according to the usual working of such mines in the district where the same shall be situate, any damage done to the railway by improper working being repaired at the expense of the owner. Under this section the owner of the mine has a statutable right as against the railway company to work the mines, and the Court will not restrain him from working them except upon condition that compensation be made to him for his loss in not working them (*l*). A purchaser of superfluous land from a railway company acquires no greater right to support than the company had in respect of such land (*m*).

Right of purchaser of superfluous lands to support.

Sects. 77—79.

In construing sects. 77—79, the Exchequer Chamber in *Fletcher* v. *Great Western Railway Co.* (*n*), held that a mine owner was entitled to claim compensation for such minerals lying within forty yards as he might leave ungotten for the purpose of furnishing support to the railway. "All that the railway company requires," said Cockburn, C. J., in delivering the judgment of the Court (*o*), "is the surface soil: it may be that the minerals will never be worked by the landowner, in which case the company ought not to be subject to any expense; and, therefore, the legislature interposes and says that the company shall be under no obligation to pay the landowner for that which may never be required: but if the

(*l*) *Stourbridge Canal Co.* v. *Earl of Dudley*, 3 El. & El. 409; 30 L. J. Q. B. 108; *Fletcher* v. *Great Western Railway Co.*, 5 H. & N. 689; 29 L. J. Ex. 253; *Bagnall* v. *London and North Western Railway Co.*, 1 H. & C. 554; 31 L. J. Ex. 480; *Great Western Railway Co.* v. *Bennett*, L. R. 2 H. L. 27; 36 L. J. Q. B. 33; *Ruabon Brick Co.* v. *Great Western Railway Co.*, (1893) 1 Ch. 427; 62 L. J. Ch. 483; and see *Eden* v. *North Eastern Railway Co.*, (1907) A. C. p. 407; 76 L. J. K. B. 940; *London and North Western Railway Co.* v. *Howley Park Coal Co.*, note (*h*), *supra*.

(*m*) *Pountney* v. *Clayton*, 11 Q. B. D. 820; 53 L. J. Q. B. 566. See *London and North Western Railway Co.* v. *Howley Park Coal Co.*, (1911) 2 Ch. p. 121; 80 L. J. Ch. 537.

(*n*) 5 H. & N. 689; 29 L. J. Ex. 253.

(*o*) 5 H. & N. pp. 698, 699; 29 L. J. Ex. p. 254.

mines come to be worked and the company requires them as necessary for the support of the surface, they must make compensation to the landowner. The very fact that provision is made by the 78th section for possible injury to the railway, shows that the legislature intended to reserve the question of support and compensation. The legislation would be incomplete, if it were not applicable to the case of a landowner, who, having parted with the surface soil to be used by a company for the purpose of putting an additional weight upon it, as a railway company must necessarily do, shall afterwards entertain an idea of working the mines under or in the neighbourhood of a railway. The minerals are reserved to the landowner, and the railway company is under no obligation of making any compensation in respect of them, until the necessity for it arises from his desire to work them. In such a case the company are to consider whether the working is liable to damage the railway, and then if they are willing to make such compensation for the mines, the owner is not to work them. The mines may never be worked, and it would be a great hardship on a railway company if, upon a speculative possibility, they were bound to make compensation for not working them. Such is the plain, intelligent, and equitable construction of these clauses, and one which is consistent with the scope of the Act" (*p*). In *London and North Western Railway Co.* v. *Ackroyd* (*q*), accordingly, Wood, V.-C., refused to restrain a mine owner from working coal within forty yards of a tunnel of the plaintiffs, who endeavoured to establish a right to support without making compensation. But if a mine owner proceeds to work his

(*p*) See *Great Western Railway Co.* v. *Bennett*, L. R. 2 H. L. 27; 36 L. J. Q. B. 33; *Smith* v. *Great Western Railway Co.*, 3 A. C. p. 165; 47 L. J. Ch. 97; *Lord Provost of Glasgow* v. *Farie*, 13 A. C. p. 675; 58 L. J. P. C. 33; *Ruabon Brick, etc., Co.* v. *Great Western Railway Co.*, (1893) 1 Ch. p. 453; 62 L. J. Ch. 483; *Eden* v. *North Eastern Railway Co.*, (1907) A. C. p. 407; 76 L. J. K. B. 940; *North British Railway Co.* v. *Budhill Coal Co.*, (1910) A. C. 129, 130; 79 L. J. P. C. 31; *London and North Western Railway Co.* v. *Howley Park Coal Co.*, (1911) 2 Ch. pp. 109, 110; 80 L. J. Ch. 537; (1913) A. C. p. 21; 82 L. J. Ch. 76.

(*q*) 31 L. J. Ch. 588.

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mines within the specified distance, without giving notice to the company of his intention to do so, as required either by the special Act, or by sect. 78 of the Railways Clauses Consolidation Act, he will be restrained by injunction (*r*).

Power of railway company to purchase minerals before expiration of compulsory powers.

A railway company, having the usual power to purchase land under its special Act, has power also to purchase the minerals under those lands at any time before the expiration of the time limited for the exercise of its compulsory powers, and the power is not taken away by sect. 77 and the following sections of the Railways Clauses Consolidation Act, which are for the benefit not of the mine owner but of the company, and only exempt the company from the obligation of buying the minerals at once together with the surface land (*s*).

Purchase by railway company after completion of railway.

A railway company may also at any time after the due completion of its railway, purchase under its general statutory powers the minerals under its line, if thought advisable in the interests of its undertaking (*t*).

Public Health Act, 1875.

Support for sewer.

The Public Health Act, 1875, imposes on landowners through whose land a sewer is laid under that Act, an obligation to preserve to such sewer subjacent support, and gives them a right to immediate compensation for being deprived of free power to work subjacent mines, but not for the risk of percolation of sewage into the subjacent mines (*u*). But by the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883, which incorporates sects. 18—27 (both inclusive) of the Waterworks Clauses Act, 1847, with respect to mines, the rights and liabilities of a local authority and of a landowner with respect to support from mines now depend upon the mineral code contained in sects. 18—27 and not on the principles of the common law. By this code the landowner is bound before working the mines subjacent and adjacent to sanitary works, to give notice to the local authority, and the

(*r*) *Elliot* v. *North Eastern Railway Co.*, 10 H. L. C. 333; 32 L. J. Ch. 402.

(*s*) *Errington* v. *Metropolitan District Railway Co.*, 19 C. D. 559; 51 L. J. Ch. 305.

(*t*) *Thompson* v. *Hickman*, (1907) 1 Ch. pp. 551, 561; 76 L. J. Ch. 254.

(*u*) *Corporation of Dudley* v. *Dudley's Trustees*, 8 Q. B. D. 86; 51 L. J. Q. B. 121. See *Jary* v. *Barnsley Corporation*, (1907) 2 Ch. p. 615; 76 L. J. Ch. 593.

local authority thereupon has an option to acquire or take and use the minerals within a certain distance of their sanitary works, making compensation for them, and so obtain support for their works. If the option of the local authority is not exercised, the landowner may work his mines, though he must not wilfully damage the works or work his mines in an unusual way.

SECTION 4.—NUISANCES RELATING TO WATER.

ANOTHER class of nuisances against which the protection of the Court by way of injunction is often sought, are nuisances relating to water. All acts done by a man on his own land, whereby the rights of his neighbour in water are injuriously affected, or whereby water becomes a cause of damage to the land of his neighbour, may be considered together as nuisances relating to water.

Bed of river.

Primâ facie, every proprietor of land along the margin of a non-tidal (*x*) river or stream of running water is the proprietor of the land covered by the water up to the *medium filum* of the stream (*y*). If the same person be the owner of the land on both sides of the river, the presumption is that he owns the bed of the whole river to the extent of the length of his land upon it (*z*), and has the usual rights of a land-

(*x*) As to when a river is "non-tidal" in the proper sense of the term, see *Reece* v. *Miller*, 8 Q. B. D. 626; 51 L. J. M. C. 64; *Yorkshire West Riding Rivers Board* v. *Tadcaster Rural Council*, (1897) 97 L. T. 436; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 401; 80 L. J. Ch. 145.

(*y*) *Orr-Ewing* v. *Colquhoun*, 2 A. C. p. 854; *Great Torrington Conservators* v. *Moore Stevens*, (1904) 1 Ch. p. 353; 73 L. J. Ch. 124; *Whitmores (Edenbridge) Co.* v. *Stanford*, (1909) 1 Ch. p. 435; 78 L. J. Ch. 144; *Jones* v. *Llanrwst Urban Council*, *supra*; and see *Central London Railway Co.* v. *City of London Land Tax Commissioners*, (1911) 2 Ch. pp. 473, 474; 80 L. J. Ch. 348; (1913) A. C. p. 277; 29 T. L. R. p. 396.

(*z*) *Wright* v. *Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94; 24 R. R. 169; *Bickett* v. *Morris*, L. R. 1 H. L. 47 (Sc.); *Jones* v. *Williams*, 2 M. & W. 326; 6 L. J. (N. S.) Ex. 107; 46 R. R. 611; *Caldwell* v. *Maclaren*, 9 A. C. p. 404; 53 L. J. P. C. 33. See, as to soil of lakes, *Bristow* v. *Cormican*, 3 A. C. 666; *Johnston* v. *O'Neill*, (1911) A. C.

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owner in respect of the same. But this is subject to all the rights of the owners above him to have the water flow away from their land, and to all the rights of the owners below him to have the water come to their land as it was wont, and it is also subject to any rights the public may have over it (*a*). Where a river was divided into two streams by an island, and the defendant, a riparian owner, claimed to remove soil from the bed of the river at a spot nearer to the island than to the plaintiffs' bank of the river, the *medium filum* was drawn not through the island, but through the stream between the island and the plaintiffs' land, and their action for an injunction to restrain the defendant's acts failed (*b*). A grant of land bounded upon a stream or river above tide-water carries the soil up to the centre of the stream, unless there is enough in the surrounding circumstances in relation to the property in question or enough in the expressions of the instrument to show that such was not the intention of the parties (*c*).

Artificial watercourse.

Where an old artificial watercourse, the origin of which is unknown, passes through the lands of several proprietors, the

552; (1912) 81 L. J. P. C. 1717; and as to the ordinary meaning of "bed of river," see *Thames Conservators* v. *Smeed & Co.*, (1897) 2 Q. B. 334; 66 L. J. K. B. 716; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 401; 80 L. J. Ch. p. 149.

(*a*) *Caldwell* v. *Maclaren*, 9 A. C. 404; 53 L. J. P. C. 33. See *Fear* v. *Vickers*, (1911) 27 T. L. R. 558; 55 S. J. 688.

(*b*) *Great Torrington Conservators* v. *Moore Stevens*, (1904) 1 Ch. 347; 73 L. J. Ch. 124.

(*c*) *Lord* v. *Commissioners of Sydney*, 12 M. o. P. C. 473; *Micklethwaite* v. *Newlay Bridge Co.*, 33 C. D. p. 145; 55 L. T. 366; *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263; 57 L. J. Q. B. 189; *Pryor* v. *Petre*, (1894) 2 Ch. p. 25; 63 L. J. Ch. 531 (C. A.); *Tilbury* v. *Silva*, 45 C. D. 98; 62 L. T. 254; *In re White's Charities*, (1898) 1 Ch. p. 664; 67 L. J. Ch. 430; *Mellor* v. *Walmesley*, (1905) 2 Ch. pp. 179, 180; 74 L. J. Ch. 475; *Chesterfield (Lord)* v. *Harris*, (1908) 2 Ch. p. 406; 77 L. J. Ch. 688; *Portsmouth Waterworks Co.* v. *London, Brighton, etc., Railway Co.*, (1910) 26 T. L. R. 173. Cf. *Ecroyd* v. *Coulthard*, (1897) 2 Ch. 555; 66 L. J. Ch. 751; (1898) 2 Ch. 358; 67 L. J. Ch. 458; followed in *Hough* v. *Clark*, (1907) 23 T. L. R. p. 683, where it was decided that the presumption that the bed of a river flowing through the waste of a manor was part of the manor was rebutted, where there was a several fishery in the river, and see *Tracey-Elliott* v. *Earl Morley*, (1907) 51 S. J. 625. As to pleading the title to the bed of a stream, see *Pledge* v. *Pomfret*, (1905) 74 L. J. Ch. 357; 92 L. T. 560; W. N. 56.

presumption is, that the watercourse was originally constructed for the use of all the riparian proprietors, and that each proprietor owns the bed of the channel adjoining his land (*d*).

Diversion of course of stream.

If from any cause the course of a stream should be permanently diverted, the proprietors on either side of the old channel have a right to use the soil of the *alveus*, each of them up to what was the *medium filum aquæ*, in the same way as they are entitled to use the adjoining land; but no riparian proprietor is entitled to use his property in the *alveus* in such a manner as to interfere with the natural flow of the stream or to cause an injury to the proprietary rights of any other riparian proprietor (*e*).

Rights of riparian owners.

There is no distinction in principle between riparian rights on the banks of navigable, and on those of non-navigable rivers. In the former case, however, there must be no interference with the right of navigation, and in order to give rise to riparian rights the land must be in actual daily contact with the stream, laterally or vertically (*f*).

A proprietor of land upon the banks of a river or stream of running water has no property in the water, but has merely a usufructuary interest in the water, as appurtenant to his land. He is entitled to the comfort, enjoyment, and benefit of the water in its natural state, as it flows past his land, as he is to all the other advantages belonging to the land of which he is owner (*g*). The right is not a right of property, but is a natural right (*h*), and does not depend on the ownership of

(*d*) *Whitmores (Edenbridge) Co.* v. *Stanford*, (1909) 1 Ch. p. 135; 78 L. J. Ch. 144.

(*e*) *Bickett* v. *Morris*, L. R. 1 H. L. (Sc.) 47, 58; *Orr-Ewing* v. *Colquhoun*, 2 A. C. p. 861.

(*f*) *Lyon* v. *Fishmongers' Co.*, 1 A. C. p. 674; 46 L. J. Ch. 68; *North Shore Railway Co.* v. *Pion*, 14 A. C. 612; 59 L. J. P. C. 25.

(*g*) *Mason* v. *Hill*, 5 B. & Ad. 1; 2 L. J. (N. S.) K. B. 118; 39 R. R. 354; *Embrey* v. *Owen*, 6 Ex. 369; 20 L. J. Ex. 212; 86 R. R. 331; *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J. Ex. 81; 115 R. R. 187; *Sharp* v. *Wilson*, (1904) 21 T. L. R. 679; 93 L. T. 155; *Edinburgh Water Trustees* v. *Sommerville* (1906), 95 L. T. 2 (H. L. Sc.); *White* v. *White*, (1904) A. C. 72; 75 L. J. P. C. 14; *Pirie & Co.* v. *Kintore (Earl)*, (1906) A. C. 484; 75 L. J. P. C. 96; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. 393, 402; 80 L. J. Ch. 145.

(*h*) *Mansell* v. *Valley Printing*

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the soil covered by the water, but is appurtenant to the ownership of the bank (*i*). The rights which a riparian proprietor has with respect to the water in a stream are derived from his possession of the land abutting on the water. If a riparian proprietor grants away any portion of his land abutting on the river, the grantee becomes a riparian proprietor and has the rights of a riparian proprietor. These riparian rights need not be granted in express terms, as they are part of the fee simple and inheritance of the land conveyed (*k*). If a riparian owner grants away a portion of his estate not abutting on the river, the grantee acquires no water rights. A riparian proprietor cannot grant away his water rights apart from his estate so as to place the grantee in the same position with respect to the other riparian proprietors as he occupied himself. If a riparian proprietor grants to one not a riparian proprietor a right to take water from the stream, the grantee cannot maintain an action in his own name against other riparian proprietors. He can only sue the grantor for an interference with his enjoyment (*l*).

Rights of riparian owners.

A riparian owner is not entitled to abstract water from a natural stream for purposes foreign to or unconnected with his riparian tenement. Such a user can only be justified by a grant from lower riparian owners or by prescription (*m*). Railway companies accordingly have been restrained from taking water from rivers to supply their locomotives along their lines (*n*), and a waterworks company has been restrained

Co., (1908) 2 Ch. p. 448; 77 L. J. Ch. 742.

(*i*) *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305; 77 R. R. 809; *Lord* v. *Commissioners of Sydney*, 12 Moo. P. C. 473; *Lyon* v. *Fishmongers' Co.*, 1 A. C. pp. 673, 683; 46 L. J. Ch. 68; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 402; 80 L. J. Ch. 145.

(*k*) *Portsmouth Waterworks Co.* v. *London, Brighton, etc., Railway Co.*, (1910) 26 T. L. R. 173.

(*l*) *Stockport Waterworks Co.* v. *Potter*, 3 H & C. 300; *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1; 36 L. J. Ex. 1; *Holker* v. *Porritt*, L. R. 10 Ex. 61, 63; 44 L. J. Ex. 52; *Ormerod* v. *Todmorden Mill Co.*, 11 Q. B. D. 155; 52 L. J. Q. B. 445; and see *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. p. 315; 73 L. J. P. C. 73.

(*m*) *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. pp. 306, 315; 73 L. J. P. C. 73.

(*n*) *Att.-Gen.* v. *Great Eastern Railway Co.*, 6 Ch. 572; 19 W. R. 788; see *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. 301;

from diverting water from a stream for the supply of the inhabitants of a neighbouring town (*o*).

Where, however, a riparian proprietor granted a licence to an owner of land not abutting on the river to abstract water from the stream by a pipe inserted in the stream on the licensor's land, and after using it the licensee returned it to the stream undiminished in quantity and undeteriorated in quality before the stream left the land of the licensor, the Court refused to grant a lower riparian proprietor an injunction against the licensee or his licensor (*p*). But a riparian proprietor has a right of action against a non-riparian proprietor who takes water from a stream under a grant or licence from a riparian proprietor, if his user of the water sensibly affects the flow or the quality of the water of the stream (*q*).

Rights of riparian owners.

A riparian proprietor has a right to the fall and flow of the water and to the impelling force of the current for mill or other manufacturing purposes; and as incident thereto he has a right to erect dams, sluices, canals and waterways so as to fit the stream for the actual working of mills; but he may not, in doing so, accelerate the velocity of the current, so as to cause material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water in its natural state, or retard or diminish the flow, or throw back the water so as injuriously to affect the grounds, mills or springs of his neighbour above him (*r*).

73 L. J. P. C. 73; *Reller* v. *Great Western Railway Co.*, (1907) 96 L. T. p. 100.

(*o*) *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, L. R. 7 H. L. 697; 45 L. J. Ch. 638; see *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. p. 314; 73 L. J. P. C. 73.

(*p*) *Kensit* v. *Great Eastern Railway Co.*, 27 C. D. 122; 54 L. J. Ch. 19; see *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. p. 313; 73 L. J. P. C. 73.

(*q*) *Ormerod* v. *Todmorden Mill Co.*, 11 Q. B. D. 155; 52 L. J. Q. B. 445.

(*r*) *Wright* v. *Howard*, 1 Sim. & St. 203; 1 L. J. (O. S.) Ch. 94; 24 R. R. 169; *Mason* v. *Hill*, 5 B. & A. 19; 2 L. J. (N. S.) K. B. 118; 39 R. R. 354; *Gaved* v. *Martyn*, 34 L. J. C. P. 363; *Embrey* v. *Owen*, 6 Ex. 369; 20 L. J. Ex. 212; 86 R. R. 331; *Orr-Ewing* v. *Colquhoun*, 2 A. C. 839, *per* Lord Blackburn; *John Young & Co.* v. *Bankier Distillery Co.*, (1893) A. C. 691; *Sharp* v. *Wilson*, (1904) 21 T. L. R. 679; 93 L. T. 155; *White* v. *White*, (1906) A. C. 72, 80; 75 L. J. P. C. 14; *Pirie & Co.* v. *Kintore (Earl)*, (1906) A. C. p. 484; 75 L. J. P. C. 3; *Portsmouth Waterworks Co.* v.

This is the clear and settled principle on the subject, but there is often difficulty in the application of it. A certain diminution in the quantity of the water, or an acceleration or retardation of the flow, is generally an implied element in the right of using the stream at all, but *de minimis non curat lex*, and unless the use be such as to affect materially the adjoining proprietor, a right of action will not arise. The test in all cases is whether the extent or mode of enjoyment has been such as to inflict a positive or sensible injury upon other riparian proprietors, or to interfere in a substantial and perceptible degree with their common right to a like user of the same water (*s*). So long as a reasonable user is made by a man of the water, and no actual or perceptible damage arises to the right of another to a similar use of the same water, no action will lie (*t*). If, however, the user be unreasonable, and the defendant claims to do the act complained of as a matter of right, an action will lie although there be no actual present damage (*u*).

London, Brighton and South Coast Railway Co., (1910) 26 T. L. R. 173; see *Fear* v. *Vickers*, (1911) 27 T. L. R. 558; 55 S. J. 688 (C. A.). See, as to throwing back water, *Cooper* v. *Barber*, 3 Taunt. 99; 12 R. R. 604; *Saunders* v. *Newman*, 1 B. & Ald. 258; 19 R. R. 312.

(*s*) *Embrey* v. *Owen*, 6 Ex. 353; 20 L. J. Ex. 212; 86 R. R. 331; *Eldeston* v. *Crossley*, 18 L. T. 15; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; 26 L. J. C. P. 148; 107 R. R. 809; *Sharp* v. *Wilson*, (1904) 21 T. L. R. 679; 93 L. T. 155; *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. p. 313; 73 L. J. P. C. 73; *Roberts* v. *Fellowes*, (1906) 94 L. T. 279; *Whitmores (Edenbridge) Co.* v. *Stanford*, (1909) 1 Ch. p. 439; 78 L. J. Ch. 144; and see *Hanbury* v. *Llanfrechfa Urban Council*, (1911) 9 L. G. R. p. 365; 75 J. P. p. 303, where a declaration of right was made with liberty to apply for an injunction, the plaintiff having suffered no actual damage.

(*t*) *Embrey* v. *Owen*, *supra*; *Baily* v. *Clark*, (1902) 1 Ch. 649; 71 L. J. Ch. 396; *Roberts* v. *Fellowes*, *supra*; *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. p. 307; 73 L. J. P. C. 73; *Whitmores (Edenbridge) Co.* v. *Stanford*, (1909) 1 Ch. p. 439; 78 L. J. Ch. 144.

(*u*) *Embrey* v. *Owen*, *supra*; *Att.-Gen.* v. *Great Eastern Railway Co.*, 6 Ch. p. 577; 19 W. R. 788; *Swindon Waterworks Co.* v. *Wilts and Berks Canal, etc., Co.*, L. R. 7 H. L. p. 705; 45 L. J. Ch. 638; *Ormerod* v. *Todmorden Mill Co.*, 11 Q. B. D. p. 159; 52 L. J. Q. B. 445; *Baily* v. *Clark*, *supra*; *Sharp* v. *Wilson*, (1904) 21 T. L. R. 679; 93 L. T. 155; *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. p. 310; 73 L. J. P. C. 73; *Roberts* v. *Fellowes*, (1906) 94 L. T. p. 281; and see *Hanbury* v. *Llanfrechfa Urban Council*, *supra*.

User of water for domestic purposes.

Whether the user of the water by an upper proprietor be reasonable is generally a question of fact depending on the particular circumstances of the case. Enjoyment of water for cattle or domestic purposes may be called the *ordinary user*. However small the stream, and however large the supply taken may be, user for these purposes is always reasonable, provided the enjoyment is *bonâ fide* and is had in the ordinary mode according to the common usage of the country. A proprietor lower down the stream has no ground of complaint against a proprietor higher up in case of a deficiency of the water (*x*).

User of water for manufacturing or agricultural purposes.

A riparian owner may also use the water for manufacturing or agricultural purposes, which may be called the "extraordinary user." Such user must be reasonable, and the purposes for which the water is taken must be connected with the owner's riparian tenement, and the water must be restored substantially undiminished in volume and unaltered in character (*y*). The right to a reasonable use of the water of a stream being common to all riparian proprietors, it is often difficult to determine whether a particular use is consistent with this common right. In determining the question a just regard must be had to the force and magnitude of the current, the volume of water, its height and velocity, the fall, the nature of the soil, the mode and duration of the user, the general usage of the country, and all other circumstances which may, in a particular case, bear upon the question. To take a large quantity of water from a large river for manufacturing or agricultural purposes would cause no sensible or perceptible diminution of the benefit to the prejudice of a lower proprietor, whereas taking the same quantity from a small stream passing a farm would be a great and manifest injury to those below who use it for domestic supply and to water cattle; and therefore it would be an

(*x*) *Miner* v. *Gilmour*, 12 Moo. P. C. 131, as modified by *Lord Norbury* v. *Kitchen*, 9 Jur. N. S. 132; *Wood* v. *Waud*, 3 Ex. p. 781; 18 L. J. Ex. 305; 77 R. R. 809; *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1; 36 L. J. Ex. 1; *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C pp. 306, 307; 73 L. J. Ch. 73; *Roberts* v. *Fellowes* (1906), 94 L. T. 279.

(*y*) *McCartney* v. *Londonderry, etc., Railway Co., supra*; *Sharp* v. *Wilson*, (1904) 21 T. L. R. p. 680; 92 L. T. 155.

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unreasonable use of the water in the latter case, and not in the former. The question in each case is entirely one of degree. It is impossible to define precisely the limits which separate the permitted use of a stream from its wrongful application (*z*).

Diversion of water.

A riparian proprietor has no right to divert any part of the water of a stream into a course different from that in which it has been accustomed to flow, for any purpose to the prejudice of any other riparian proprietor. The upper of two riparian proprietors on the same stream may divert the water on his own land by an artificial channel, provided he restore it to the natural channel before it leaves his land, with reasonable care and prudence and without injury to the lower riparian proprietors. But the diversion by a riparian proprietor of any portion of the stream without returning the water to its natural channel before it leaves his land is an unlawful user, if any other riparian proprietor is prejudiced thereby (*a*). Thus, the diversion of the water of a stream to such an extent as to leave the natural channel at times bare of water, thereby interfering with the passage of salmon up a river will be restrained as an improper user of the stream and a wrong against the owners of the upper fisheries (*b*). So also, the diversion of water from a stream for the purpose

Interference with passage of salmon.

(*z*) *Embrey* v. *Owen*, 6 Ex. 369; 20 L. J. Ex. 212; 86 R. R. 331; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, L. R. 7 H. L. p. 704; 45 L. J. Ch. 638; see *Ormerod* v. *Todmorden Mill Co.*, 11 Q. B. D. 155; 52 L. J. Q. B. 445; *Belfast Co.* v. *Boyd*, 21 L. R. Ir. 560; *Mostyn* v. *Atherton*, (1899) 2 Ch. 360; 68 L. J. Ch. 629; *Baily* v. *Clark*, (1902) 1 Ch. 649; 71 L. J. Ch. 396; *Sharp* v. *Wilson*, (1904) 21 T. L. R. 679; 93 L. T. 155; *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. 306; 73 C. J. Ch. 73. See as to the detention of water, *Shears* v. *Wood*, 7 Moo. 345; 1 L. J. (O. S.) C. P. 3; *Williams* v. *Morland*, 2 B. & C. 910; 2 L. J. K. B. 191; 26 R. R. 579; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; 26 L. J. C. P. 148; 107 R. R. 809.

(*a*) *Luttrel's Case*, 4 Co. Rep. 86 b; *Bealey* v. *Shaw*, 6 East, 208; 8 R. R. 466; *Wright* v. *Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94; 24 R. R. 169; *Ferrand* v. *Bradford Corporation*, 21 Beav. 412; 111 R. R. 144.

(*b*) *Pirie & Co.* v. *Kintore (Earl)*, (1906) A. C. p. 484; 75 L. J. P. C. 96; and see *Hanbury* v. *Llanfrechfa Upper Urban Council*, (1911) 9 L. G. R. 360; 75 J. P. 307; see *Barker* v. *Faulkner*, (1898) 79 L. T. 24; W. N. 69 (erection of weirs).

of supplying a neighbouring town (*c*) or a county gaol (*d*), or the locomotives of a railway company along their line (*e*), is an unlawful user of the water which has been restrained by injunction.

Alteration of flow of stream by local authority.

A local authority has no power under sect. 51 of the Public Health Act, 1875, for the purpose of supplying water to its district, to alter the flow of water in a stream, without the consent in writing of the riparian proprietors lower down the stream, as required by section 332 of the Act. By so altering the flow of water the local authority is "injuriously affecting" within the meaning of section 332, the common law rights of such riparian proprietors and will be restrained from so doing, without proof of sensible damage caused thereby (*f*), nor has a local authority power under the Public Health Act, 1875, to grant a licence to a stranger to take water from a public well for commercial purposes (*g*).

Rights of riparian owners may be affected by statute.

Riparian owners are entitled, except so far as their rights are varied by statute, or other special circumstances, to require that nothing shall be done to affect to their prejudice the quantity or the quality of a stream as it flows in its natural state, and when an Act of Parliament authorises an interference with the natural flow of a stream, the original rights of the riparian owners are impaired only so far as the reasonable exercise of the statutory rights impairs them (*h*), and the owner's remedy is under the compensation clauses of the Act (*i*).

(*c*) *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, L. R. 7 H. L. 697; 45 L. J. Ch. 638; *Roberts* v. *Richards*, 50 L. J. Ch. 297; 51 L. J. Ch. 944; *Roberts* v. *Gwyrfrai District Council*, (1899) 1 Ch. 583; 68 L. J. Ch. 233; (1899) 2 Ch. 608; 68 L. J. Ch. 757; *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. p. 309; 73 L. J. P. C. 73.

(*d*) *Medway Navigation Co.* v. *Romney (Earl)*, 9 C. B. N. S. 575; 30 L. J. C. P. 236.

(*e*) *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. 301; 73 L. J. P. C. 73.

(*f*) *Roberts* v. *Gwyrfrai District Council*, (1899) 2 Ch. 608; 68 L. J. Ch. 757; cf. *O'Callaghan* v. *Balrothery*, (1907) 1 Ir. 499; and see *Mostyn* v. *Atherton*, (1899) 2 Ch. 360; 68 L. J. Ch. 629.

(*g*) *Mostyn* v. *Atherton*, *supra*.

(*h*) *Edinburgh Water Trustees* v. *Sommerville*, (1906) 95 L. T. 217 (H. L. Sc.).

(*i*) *Redler* v. *Great Western Railway Co.*, (1907) 96 L. T. 98 (H. L.).

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Where a defendant claims the right to use the water of a stream in an unreasonable manner, it is not necessary for the plaintiff to show that he has sustained actual injury in order to obtain an injunction (*k*).

Stream at the source.

Where a spring of water arises on a man's land, he may, it seems, use it as he does any other property which is the produce of his estate, without regard to the convenience or advantage of his neighbour, *provided that* the water is not at its source a watercourse. But if a stream begins to flow at the spring head in a defined channel, the rights incidental to streams of running water attach to it at the source (*l*). The rights of a riparian proprietor in respect of a natural stream extend to its tributaries or feeders flowing in defined channels or watercourses, but do not extend to water flowing over or soaking through land previous to its arrival at a stream (*m*).

Stream flowing from underground.

The same principles which apply to natural streams flowing in a defined channel over the surface are also applicable to streams flowing from under the ground in a distinct and well-defined channel. The right in the latter case is equally a right *ex jure naturae*, and is incident to the adjacent land as a beneficial adjunct (*n*). But the right does not exist in the

(*k*) *Sampson* v. *Hoddinott*, 1 C. B., N. S. 590; 26 L. J. C. P. 148; *Harrop* v. *Hirst*, L. R. 4 Ex. 43; 38 L. J. Ex. 1; *Norbury* v. *Kitchen*, 15 L. T. 501; *Ormerod* v. *Todmorden Joint Stock Mill Co.*, 11 Q. B. D. p. 159; 52 L. J. Ch. 445; *Roberts* v. *Gwyrfrai District Council*, (1899) 2 Ch. p. 614; 68 L. J. Ch. 757; *Sharp* v. *Wilson*, (1904) 21 T. L. R. p. 680; *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. p. 310; 73 L. J. P. C. 73.

(*l*) *Dudden* v. *Guardians of Clutton Union*, 1 H. & N. 627; 26 L. J. Ex. 146; 108 R. R. 752; *Gavel* v. *Martyn*, 19 C. B. (N. S.) 732; 34 L. J. C. P. 353; *Bunting* v. *Hicks*, 70 L. T. 455; *Mostyn* v. *Atherton*, (1899) 2 Ch. 360; 68 L. J. Ch. 629; *Portsmouth Waterworks* v. *London, Brighton, and South Coast Railway Co.*, (1910) 26 T. L. R. p. 175

(*m*) *Broadbent* v. *Ramsbotham*, 11 Ex. p. 617; 25 L. J. Ex. 115; 105 R. R. 673; *McNab* v. *Robertson*, (1897) A. C. 129; 66 L. J. P. C. 27.

(*n*) *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305; 77 R. R. 809; *Dickinson* v. *Grand Junction Canal Co.*, 7 Ex. p. 300; 21 L. J. Ex. 241; *Chasemore* v. *Richards*, 7 H. L. C. p. 384; 29 L. J. Ex. 81; 115 R. R. 187; *Hodgkinson* v. *Ennor*, 4 B. & S. 229; 32 L. J. Q. B. 231; *Grand Junction Canal Co.* v. *Shugar*, 6 Ch. 486; 19 W. R. 563; *Black* v. *Ballymena Commissioners*, 17 L. R. Ir. 459; *McNab* v. *Robertson*, (1897) A. C. p. 134; 66

case of underground water flowing in a defined but unknown channel (*o*).

Pollution of stream.

A riparian owner is entitled to the flow of water past his land, in its natural state of purity undeteriorated by noxious matter discharged into it by others (*p*), and any one who fouls the water infringes a right of property of the riparian owner, who can maintain an action against the wrongdoer without proving that the pollution has caused him actual damage (*q*), and the action can be maintained even although other persons may have so fouled the water that the acts of the wrongdoer may not have rendered the water less applicable to useful purposes than it was before, for the damage is an injury to a right, and therefore actionable (*r*).

Injury to fishing rights.

The grantee of an exclusive right of fishing is entitled to an injunction to restrain the pollution of the stream (*s*), and can maintain an action for damages and an injunction notwithstanding that the acts complained of are offences under

L. J. P. C. 27; and see *Mostyn* v. *Atherton*, (1899) 2 Ch. 360; 68 L. J. Ch. 629; *English* v. *Metropolitan Water Board*, (1907) 1 K. B. p. 601; 76 L. J. K. B. 361.

(*o*) *Bradford Corporation* v. *Ferrand*, (1902) 2 Ch. 655; 71 L. J. Ch. 859; *Mansell* v. *Valley Printing Co.*, (1908) 2 Ch. p. 448; 77 L. J. Ch. p. 745.

(*p*) *Embrey* v. *Owen*, 6 Ex. p. 369; 20 L. J. Ex. 212; 86 R. R. 331; *Lyon* v. *Fishmongers' Co.*, 1 A. C. 673, 674; 46 L. J. Ch. 68; *John Young & Co.* v. *Bankier Distillery Co.*, (1893) A. C. 691; 69 L. T. 838 (Sc.); *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. 393, 402; 80 L. J. Ch. 145.

(*q*) *Lingwood* v. *Stowmarket Co.*, L. R. 1 Eq. 77; *Goldsmid* v. *Tunbridge Wells Commissioners*, 1 Ch. 349; 35 L. J. Ch. 382; *Crossley* v. *Lightowler*, 2 Ch. 478, 36 L. J. Ch. 584; *John Young & Co.* v. *Bankier Distillery Co.*, (1893) A. C. p. 698; 69 L. T. 838; *Sharp* v. *Wilson*, (1904) 21 T. L. R. 678; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 402; 80 L. J. Ch. 145.

(*r*) *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305; 77 R. R. 809; *Wood* v. *Sutcliffe*, 2 Sim. N. S. 163, 166; 21 L. J. Ch. 253; 89 R. R. 262; *Crossley* v. *Lightowler*, 2 Ch. p. 481; 36 L. J. Ch. 584; *Pennington* v. *Brinsop Coal Co.*, 5 C. D. p. 772; 46 L. J. Ch. 773; *Att.-Gen.* v. *Leeds Corporation*, 5 Ch. 583; 39 L. J. Ch. 711; *Blair* v. *Deakin*, 57 L. T. 552; (1887) W. N. 148.

(*s*) *Fitzgerald* v. *Firbank*, (1897) 2 Ch. 96; 66 L. J. Ch. 529. See *Foster* v. *Warblington Urban Council*, (1906) 1 K. B. 648; 75 L. J. K. B. 514 (pollution of oyster beds on foreshore).

the Salmon Fishery Acts punishable on conviction in summary proceedings (*t*).

Discharge of sewage into stream by local authorities.

Local authorities have power under the Public Health Act, 1875, to discharge sewage into a natural stream or watercourse, if the sewage has been freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the actual standard of purity and quality of the water in such stream or watercourse (*u*); and an injunction will be granted to restrain a local authority committing a breach of the Act (*x*).

Right to affect flow of water may be acquired by prescription.

The right to affect the quantity, quality, or the flow of water may be acquired by prescription (*y*). But the mere omission by a riparian proprietor to use the water of the stream does not impair his title, or confer any right thereto upon another. The right exists whether he exercises it or not. He may begin to exercise it whenever he will. It is not the non-user by a man of his right, but the adverse enjoyment by another during twenty years, which destroys the right (*z*). The time from which a prescriptive right begins

(*t*) *Fraser* v. *Fear*, (1912) 107 L. T. 423, 426; W. N. 227.

(*u*) See sects. 15, 16, 17, and *Durrant* v. *Branksome Urban Council*, (1897) 2 Ch. 291; 66 L. J. Ch. 653. See also *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 411; 80 L. J. Ch. 145.

(*x*) *Att.-Gen.* v. *Birmingham, Tame and District Drainage Board*, (1910) 1 Ch. 48; 79 L. J. Ch. 137; (1912) A. C. 788; 82 L. J. Ch. 45.

(*y*) *Bealey* v. *Shaw*, 6 East, 208; 8 R. R. 466; *Mason* v. *Hill*, 5 B. & Ad. 1; 2 L. J. (N. S.) K. B. 118; 39 R. R. 354; *Murgatroyd* v. *Robinson*, 7 E. & B. 391; 26 L. J. Q. B. 233; *Sampson* v. *Hoddinott*, 1 C. B. N. S. p. 611; 26 L. J. C. P. 148; 107 R. R. 809; *Goldsmid* v. *Tunbridge Wells Commissioners*, 1 Ch. 349; 35 L. J. Ch. 382; *Crossley* v. *Lightowler*, 2 Ch. 478; 36 L. J. Ch. 584; *McIntyre Brothers* v. *McGarvin*, (1893) A. C. 268; *McCartney* v. *Londonderry, etc., Railway Co.*, (1904) A. C. p. 313; 73 L. J. P. C. 73; *Harrington (Earl)* v. *Derby Corporation*, (1905) 1 Ch. p. 219; 74 L. J. Ch. 219; *White* v *White*, (1906) A. C. p. 80; 75 L. J. P. C. 14; *Att.-Gen.* v. *Grand Junction Canal Co.*, (1909) 2 Ch. p. 516; 78 L. J. Ch. 681; *Portsmouth Waterworks Co.* v. *London, Brighton, etc., Railway Co.*, (1910) 26 T. L. R. p. 174; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 410; 80 L. J. Ch. 145. See also *Att.-Gen.* v. *Great Northern Railway Co.*, (1909) 1 Ch. 775; 78 L. J. Ch. 577.

(*z*) *Sampson* v. *Hoddinott*, 1 C. B. N. S. p. 611; 26 L. J. C. P. p. 150; *Bealey* v. *Shaw*, 6 East, 208; 8 R. R. 466; *Mason* v. *Hill*, 5 B. & Ad. 1; 2

to accrue is the time when the rights of another riparian proprietor is disturbed (*a*). As between two opposite riparian proprietors, the user by the one of the whole or the greater part of the water by means of structures erected upon and within the limits of his own estate is not an adverse possession, which will raise the presumption of grant, for riparian proprietors on the opposite banks of a stream stand to each other in the relation and with substantially the rights of tenants in common (*b*). To constitute adverse possession, the possession by the one must be so wholly inconsistent with the claim of the other as to amount to an actual ouster (*c*). The abstraction of water from a stream openly and under claim of right for a period of twenty years to a tenement not abutting on the stream will create no easement to have pure water flow down the stream to the point of abstraction (*d*).

Prescription Act, 2 & 3 Will. IV. c. 71.

The acquisition of new rights to water by long user comes within the provisions of the Prescription Act 2 & 3 Will. IV. c. 71. By the 2nd and 4th clauses of that Act the continuous enjoyment as of right (*e*) of a watercourse (*f*) or the use of water as an easement over or from any land or water for twenty years next before the commencement of some suit or action in which the claim has been brought in question (*g*) without interruption acquiesced in for a year (*h*), is evidence

L. J. (N. S.) K. B. 118; 39 R. R. 354; *Crossley* v. *Lightowler*, *supra*; and see *Hanbury* v. *Llanfrechfa Urban Council*, (1911) 9 L. G. R. pp. 364, 365; 75 J. P. 307.

(*a*) *Kensit* v. *Great Eastern Railway Co.*, 27 C. D. 122, 129; 54 L. J. Ch. 19.

(*b*) *Beauman* v. *Kinsella*, 8 Ir. C. L. 291.

(*c*) Ib. See *Stedman* v. *Smith*, 8 E. & B. 1; 26 L. J. Q. B. 314; 112 R. R. 446.

(*d*) *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300.

(*e*) See *Gardner* v. *Hodgson's Kingston Breweries*, (1901) 2 Ch. 198; 70 L. J. Ch. 504; (1903) A. C. 229; 72 L. J. Ch. 558.

(*f*) See *Wright* v. *Williams*, 1 M. & W. 77; 5 L. J. Ex. 107; *Taylor* v. *Corporation of St. Helen's*, 6 C. D. 264; 46 L. J. Ch. p. 860; *Chamber Colliery Co.* v. *Hopwood*, 32 C. D. p. 558; 55 L. J. Ch. 859.

(*g*) *Cooper* v. *Hubbuck*, 12 C. B. N. S. 456.

(*h*) *Ante*, p. 191; *Eunor* v. *Barwell*, 2 Giff. 420.

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Easements in water.

from which a jury is justified in presuming a right, if the claim be otherwise good at common law (*i*).

A right may be acquired under the statute to interfere with the course of water either by damming it up and forcing it back upon the land above, or by transmitting it altered in quality or quantity or velocity to the inferior proprietor (*k*). A claim to discharge a stream of water either in its natural state or changed in quality over land (*l*), or to foul a stream by throwing rubbish into it (*m*), or by discharging into it sewage water (*n*), or water fouled in the process of manufacture (*o*), or generally to interfere with its purity to such an extent as to cause damage to another (*p*), is within the statute. So also a claim to go on the soil of another to clear a mill-stream and repair its banks (*q*), or to open the gates of sluices in time of flood or likelihood of flood so as to protect the land of the dominant owner (*r*), or to turn the water

(*i*) *Gavel* v. *Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353.

(*k*) *Wright* v. *Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; 26 L. J. C. P. 148; 107 R. R. 809; *Mason* v. *Shrewsbury Railway Co.*, L. R. 6 Q. B. 578, 587; 40 L. J. Q. B. 293; *White* v. *White*, (1906) A. C. p. 80; 75 L. J. P. C. 14; *Portsmouth Waterworks Co.* v. *London, Brighton, etc., Railway Co.*, (1910) 26 T. L. R. p. 174.

(*l*) *Wright* v. *Williams*, 1 M. & W. 77; 5 L. J. (N. S.) Ex. 107; 46 R. R. 265; *Briscoe* v. *Drought*, 11 Ir. C. L. 250: *Baxendale* v. *McMurray*, 2 Ch. 790; 15 W. R. 32.

(*m*) *Carlyon* v. *Lovering*, 1 H. & N. p. 798; 26 L. J. Ex. 251; 108 R. R. 822.

(*n*) *Att.-Gen.* v. *Luton Board of Health*, 2 Jur. N. S. 181; 106 R. R. 929. See *Att.-Gen.* v. *Dorking Union*, 20 C. D. 604; 51 L. J. Ch. 585; *Harrington* (*Earl*) v. *Derby Corporation*, (1905) 1 Ch. 205; 74 L. J. Ch. 219; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 410; 80 L. J. Ch. p. 153.

(*o*) *Moore* v. *Webb*, 1 C. B. N. S. 673; 107 R. R. 854; *Murgatroyd* v. *Robinson*, 7 E. & B. 391; 26 L. J. Q. B. 233; *Baxendale* v. *McMurray*, 2 Ch. 790; 15 W. R. 32. See *Butterworth* v. *West Riding of Yorkshire Rivers Board*, (1909) A. C. 45; 78 L. J. K. B. 203; and the Rivers Pollution Prevention Acts, *post*, p. 265.

(*p*) *Weeks* v. *Heward*, 10 W. R. 557; 125 R. R. 964; *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305; 77 R. R. 809; see *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 402; 80 L. J. Ch. 145.

(*q*) *Beeston* v. *Weate*, 5 E. & B. 996; 25 L. J. Q. B. 115; *Roberts* v. *Fellowes* (1906), 94 L. T. 279; and see *Jones* v. *Pritchard*, (1908) 1 Ch. p. 638; 77 L. J. Ch. p. 409.

(*r*) *Simpson* v. *Mayor of Godmanchester*, (1897) A. C. 696; 66 L. J. Ch. 770.

into an artificial watercourse (*s*), is within the statute. If a right to discharge water over the land of another in a specific channel be acquired by prescription, the obstruction of the channel by the owner of the servient tenement is an invasion of a legal right for which an action is maintainable without proof of actual perceptible damage (*t*).

Persons within the district where the custom of tin bounding prevails are not in a less favourable condition in reference to acquiring rights of water by prescription than in other parts of the country (*u*). The easement passes to the owner of the soil when the bounding comes to an end (*x*).

The right to affect the quality, the quantity, or the flow of water in a manner not justified by natural right is an easement, and is therefore subject to the general law of easements. The right becomes extinguished upon unity of seisin and possession of both tenements in the same person (*y*). The right when acquired by grant must be measured by the terms of the grant (*z*), when derived from prescription or under the statute, it must be measured by the actual enjoyment, and can only be commensurate with it. A man who has acquired a right by actual enjoyment is entitled to all which he has enjoyed during the prescribed period both to the same extent and in the same specific manner, but to nothing more (*a*). The user which originated the right must also be its measure (*b*). If a man has acquired the right to divert water

Limits of the right.

(*s*) *Beeston* v. *Weate*, 5 E. & B. 996; 25 L. J. Q. B. 115.

(*t*) *Clarton* v. *Clarton*, Ir. R. 7 C. L. 23.

(*u*) *Gavel* v. *Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353; *Ivimey* v. *Stocker*, 1 Ch. 396; 35 L. J. Ch. 467.

(*x*) *Ivimey* v. *Stocker*, ib.

(*y*) *Ewart* v. *Cochrane*, 4 Macq. 117; *Ivimey* v. *Stocker*, 1 Ch. p. 407; 35 L. J. Ch. 467.

(*z*) *Williams* v. *James*, L. R. 2 C. P. p. 581; 36 L. J. C. P. 256; *Taylor* v. *St. Helen's Corporation*, 6 C. D. pp. 270, 271; *Mayor of New Windsor* v. *Stovell*, 27 C. D. p. 672; 54 L. J. Ch. 113; *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, (1907) 1 Ch. p. 220; 75 L. J. Ch. p. 810.

(*a*) *Bealey* v. *Shaw*, 6 East, 208; 8 R. R. 466; *Davies* v. *Williams*, 16 Q. B. p. 558; 20 L. J. Q. B. p. 336; 83 R. R. 592; *Goldsmid* v. *Tunbridge Wells Commissioners*, 1 Ch. p. 352; 35 L. J. Ch. 382; *Pirie & Co.* v. *Earl Kintore*, (1906) A. C. pp. 484, 485; 75 L. J. P. C. 96.

(*b*) *Crossley* v. *Lightowler*, 2 Ch. 481; 36 L. J. Ch. 584; and see *Att.-Gen.* v. *Great Northern Railway Co.*, (1909) 1 Ch. 775; 78 L. J. Ch. 577.

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in certain proportions, he cannot increase the proportions (*c*). So also if the enjoyment has been only upon certain days in the week, the water cannot be used on other days (*d*). So also if a riparian owner has a prescriptive right to take in a particular place and way water from a river and to return such water to the river in an impure state he cannot take the water in any other place or way (*e*). So also a man who has gained a right to foul the waters of a stream cannot, if he enlarge his works, claim a right to discharge into the stream a greater quantity of fouled matter than he gained the right to discharge by user during the prescribed period (*f*). So also if a man has an artificial drain or sewer by which he drains either water or sewage into his neighbour's land, he cannot use that drain so as to drain another close or another house (*g*). So also if a prescriptive right has been acquired to send some sewage into the sewers of another district, the burden cannot be increased without the consent of the sanitary authority of the latter district (*h*). The fact that the inhabitants of a town may have acquired a prescriptive right to drain their houses into a stream does not give a public board acting on behalf of the community a right to discharge the sewage of the town into the stream, so as to cause riparian proprietors a greater amount of inconvenience than they were exposed to before (*i*).

Alteration in the mode of use.

But although the extent of a prescriptive right is limited by

(*c*) *Brown* v. *Best*, 1 Wils. 174. See *Pirie & Co.* v. *Earl Kintore*, (1906) A. C. 478; 75 L. J. P. C. 96.

(*d*) *Strutt* v. *Bovingdon*, 5 Esp. 56; 8 R. R. 834.

(*e*) *McIntyre* v. *McGavin*, (1893) A. C. 268; *Pirie & Co.* v. *Earl Kintore*, (1906) A. C. p. 485; 75 L. J. P. C. 96.

(*f*) *Moore* v. *Webb*, 1 C. B. N. S. 673; 107 R. R. 854; *Crossley* v. *Lightowler*, 2 Ch. 481; 36 L. J. Ch. 584; *McIntyre* v. *McGavin*, (1893) A. C. p. 277; and see *Harrington* (*Earl*) v. *Derby Corporation*, (1905) 1 Ch. p. 220; 74 L. J. Ch. 219.

(*g*) *Metropolitan Board of Works* v. *London and North Western Railway Co.*, 17 C. D. 246; 50 L. J. Ch. 409; and see *Gibbings* v. *Hungerford*, (1904) 1 I. R. p. 229.

(*h*) *Att.-Gen.* v. *Acton Local Board*, 22 C. D. 221; 52 L. J. Ch. 108. See also *Brown* v. *Dunstable Corporation*, (1899) 2 Ch. 378; 68 L. J. Ch. 498; *Islington Vestry* v. *Hornsey Urban Council*, (1900) 1 Ch. 695.

(*i*) *Att.-Gen.* v. *Luton Board of Health*, 2 Jur. N. S. 180; 106 R. R. 929; see *Att.-Gen.* v. *Borough of Birmingham*, 4 K. & J. p. 528; 116

the actual enjoyment, the mode and manner in which the right is exercised need not be the same. A change in the mode and object of the use of the water is justifiable, provided the quantity taken be not sensibly increased or the quality sensibly affected, or the alteration be not such as to cast a greater burden upon the other riparian proprietors. All that the law requires is that the rights of others be not sensibly or materially affected (*k*). Persons who have a right to navigate a canal are not limited to any mode of traction or propulsion. They may use steam power, provided it occasions no more than ordinary injury to the canal (*l*). So also the owner of a paper mill who has acquired a prescriptive right to foul a stream by discharging into it refuse and washings produced by the workings of rags, used for the purposes of the business, may introduce a new vegetable fibre for the purposes of the manufacture, instead of using rags, provided he does not thereby increase the pollution of the stream (*m*). But persons who had acquired a prescriptive right to discharge the refuse of a fellmongery business into a stream, were held not to be entitled to discharge the refuse from the manufacture of leather boards which they had substituted for the fellmongery business (*n*).

Onus of proof of increase of pollution.

The onus of proving the increase of pollution lies on the plaintiff (*o*).

R. R. 445; *Goldsmid* v. *Tunbridge Wells Commissioners*, 1 Ch. 349; 35 L. J. Ch. 382; *Brown* v. *Dunstable Corporation*, (1899) 2 Ch. 378; 68 L. J. Ch. 468; *Gibbings* v. *Hungerford*, (1904) 1 Ch. p. 228; *Harrington* (*Earl*) v. *Derby Corporation*, (1905) 1 Ch. pp. 220, 221; 74 L. J. Ch. 219.

(*k*) *Luttrel's case*, 4 Co. R. 86 b.; *Saunders* v. *Newman*, 1 B. & Ald. 258; 19 R. R. 312; *Thomas* v. *Thomas*, 2 Cr. M. & R. 34; 4 L. J. (N. S.) Ex. 179; 41 R. R. 678; *Hall* v. *Swift*, 4 Bing. N. C. 381; 7 L. J. (N. S.) C. P. 209; 44 R. R. 728; *Harvey* v. *Walters*, L. R. 8 C. P. p. 166; 42 L. J. C. P. 107. See *Royal Mail Steam Packet Co.* v. *George & Branday*, (1900) A. C. 480.

(*l*) *Case* v. *Midland Railway Co.*, 27 Beav. 247; 28 L. J. Ch. 727; 122 R. R. 396.

(*m*) *Baxendale* v. *McMurray*, 2 Ch. 790; 15 W. R. 32.

(*n*) *Clarke* v. *Somersetshire Drainage Commissioners*, 57 L. J. M. C. 96; 36 W. R. 890.

(*o*) *Baxendale* v. *McMurray*, *supra*. As to the onus where the defendant, an upper riparian owner, alleged he had increased by artificial means the flow from a spring, see *Portsmouth Waterworks Co.* v.

In determining whether a greater burden is cast on the servient tenement by an alteration of the dominant tenement, the question must be considered from a reasonable point of view. A mere small alteration or addition to the burden would not be an illegal act (*p*).

Interruption.

If a man having a limited right in water exercises the right in excess (as where a man having a right to send clean water down a drain sends down foul water (*q*)), the person against whom it is exercised may obstruct the whole flow, if he cannot obstruct the part in excess without obstructing the whole. An action will not lie for the obstruction until the right has been reduced within its proper limits (*r*). If the part in excess can be separated, the party against whom it is exercised may not stop the whole flow (*s*).

Abandonment.

The right to an easement in water may be lost by abandonment, where the circumstances of the case are such that an intention to abandon the right permanently can be reasonably presumed (*t*). The right, however, is not lost by a temporary interruption from natural causes (*u*), nor by the mere non-exercise of the right during a period when it was not wanted (*x*).

Artificial watercourses.

The rights and liabilities of parties in respect of artificial streams and watercourses do not rest on the same principles as the rights and liabilities of riparian proprietors in respect

London, Brighton, etc., Railway Co., (1910) 26 T. L. R. 173.

(*p*) *Hall* v. *Swift*, 4 Bing. N. C. 383; 7 L. J. (N. S.) C. P. 209; 44 R. R. 728; *Harvey* v. *Walters*, L. R. 8 C. P. p. 166; 42 L. J. C. P. 105; *Wood* v. *Saunders*, 10 Ch. D. 44 L. J. Ch. 514.

(*q*) *Cawkwell* v. *Russell*, 26 L. J. Ex. 34.

(*r*) *Cawkwell* v. *Russell*, ib.; *Blackburne* v. *Somers*, 5 L. J. Ir. 5; *Watson* v. *Trough[illegible]*, 48 L. T. 508. See *Frechette* v. *St. Hyacinthe*, 9 A. C. P. p. 184; 53 L. J. P. C. 20.

(*s*) *Hill* v. *Cock*, 26 L. T. 185.

(*t*) *We[illegible]* v. *Ward*, 7 Ex. 838; 21 L. J. Ex. 334; 86 R. R. 852; *Crossley* v. *Lightowler*, 3 Eq. 292; 2 Ch. 482; 36 L. J. Ch. 584; *James* v. *[illegible]venson*, (1893) A. C. p. 167; [illegible]. P. C. 51.

(*u*) *Ha[illegible]* *wift*, 4 Bing. N. C. 381; 7 [illegible]. S.) C. P. 209; 44 R. R. [illegible] See *Carr* v. *Foster*, 3 Q. B. 5[illegible]; 11 L. J. Q. B. 284; 61 R. R. 321; *Bower* v. *Hill*, 1 Bing. N. C. 549; 4 L. J. (N. S.) C. P. [illegible]53; 41 R. R. 630.

(*x*) *Roberts* v. *Fellowes* (1906), 94 L. T. p. 281; *Hanbury* v. *Llanfrechfa Urban Council*, (1911) 75 J. P. 307; 9 L. G. R. 360.

of natural streams and watercourses (*y*). In dealing with a claim to the enjoyment of water flowing through an artificial watercourse, the character of the watercourse, whether it is temporary or permanent, the circumstances under which it was presumably created, and the mode in which it has been in fact used and enjoyed, must be considered (*y*). The water in an artificial stream is the property of the party by whom it is created or caused to flow. If the stream so created is made to flow upon the land of a neighbour without his consent, it is a wrong for which the party causing the flow is liable; but he may by long enjoyment gain a right to continue the discharge. His neighbour, however, cannot gain by long enjoyment a right to insist on the continuance of the discharge if the watercourse is of a temporary character. Thus the discharge of water for twenty years from a mine by a mine owner in the course of his mining operations, or by a landowner from his drainage works, will give no right to a neighbour below who has enjoyed the benefit of the water, so as to preclude the mine owner from ceasing to pump out his mine after the ore shall have been exhausted, or from sending the water off in a different direction, or the landowner from altering the course or level of his drains (*z*). But if the artificial stream is permanent in its character, a right to the uninterrupted flow of water may be acquired both against the creator of the stream, and also against any person over whose land the water flows (*a*). In the case of an artificial watercourse, any right of a riparian owner to the flow of the water, must rest on some grant or arrangement, either

(*y*) *Rameshur Pershad Singh* v. *Koonj Pattuk*, 4 A. C. 121; *Burrows* v. *Lang*, (1901) 2 Ch. 507; 70 L. J. Ch. 607; *Baily* v. *Clark*, (1902) 1 Ch. pp. 652, 668; 71 L. J. Ch. 396; and see *Whitmores (Edenbridge), Ltd.* v. *Stanford*, (1909) 1 Ch. 427, 436; 78 L. J. Ch. 144; *Lewis* v. *Meredith*, (1913) 1 Ch. 571; 82 L. J. Ch. 255

(*z*) *Arkwright* v. *Gell*, 5 M. & W. 203; 8 L. J. (N. S.) Ex. 201; 52 R. R. 671; *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305; 77 R. R. 809; *Greatrex* v. *Hayward*, 8 Ex. 291; 22 L. J. Ex. 137; *Rawstron* v. *Taylor*, 11 Ex. 369; 25 L. J. Ex. 33; 105 R. R. 567; and see *Burrows* v. *Lang*, (1901) 2 Ch. 502; 70 L. J. Ch. 607; *Whitmores (Edenbridge), Ltd.* v. *Stanford*, (1909) 1 Ch. p. 436; 78 L. J. Ch. 144.

(*a*) *Arkwright* v. *Gell*; *Wood* v. *Waud*, *supra*; *Briscoe* v. *Drought*, 11 Ir. C. L. 250.

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proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin (*b*). In a recent case (*c*), where the channel of a stream was an artificial one of great age, and the plaintiffs and their predecessors owners in fee of an ancient tannery situated on the banks of the stream, had used the water constantly and openly for 250 years, the Court held that it must infer that the stream was originally constructed for the mutual benefit of the owners of the tannery and of the mill lower down the stream, and that the plaintiffs were entitled under a reservation made or agreement entered into when the channel was constructed, to use the water for all reasonable purposes not causing any sensible or material injury to the owners of the mill and the defendants who were the occupiers of the ancient mill, with control over sluice gates regulating the flow of water into the mill stream, were restrained from interfering with the plaintiffs' right to abstract water from the stream.

Artificial watercourses.

The circumstances under which an artificial watercourse has been made, and the manner in which it has been used accordingly, may be such as to give the proprietor of land adjacent all the rights which they would have been entitled to claim as riparian proprietors, had it been a natural stream (*d*). If it appear that the stream was originally intended to have a permanent flow, or to be of a permanent character, or if the party by whom, or in whose behalf it was caused to flow can be shown to have abandoned permanently the works by which the flow was caused without intention to resume them, and to have given up all right to and control

(*b*) *Baily* v. *Clark*, (1902) 1 Ch. p. 653; 71 L. J. Ch. 396.

(*c*) *Whitmores* (*Edenbridge*), *Ltd.* v. *Stanford*, (1909) 1 Ch. 427; 78 L. J. Ch. 144.

(*d*) *Mayor* v. *Chadwick*, 11 A. & E. 571; 9 L. J. Q. B. 159; *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305; 77 R. R. 809; *Sutcliffe* v. *Booth*, 32 L. J. Q. B. 136; *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1; 36 L. J. Ex. 1; *Rameshur, etc., Singh* v. *Koonj Pattuk*, 4 A. C. 121; *Roberts* v. *Richards*, 50 L. J. Ch. 301; 51 L. J. Ch. 944; *McEvoy* v. *Great Northern Railway Co.*, (1900) 2 I. R. 325, 333; *Hanna* v. *Pollock*, (1898) 2 I. R. 532; (1900) 2 I. R. 664; *Baily* v. *Clark*, (1902) 1 Ch. 649; 71 L. J. Ch. 396; *Whitmores* (*Edenbridge*), *Ltd.* v. *Stanford*, (1909) 1 Ch. 427; 78 L. J. Ch. 144; and see *Lewis* v. *Meredith*, (1913) 1 Ch. 571; 82 L. J. Ch. 255.

over the stream, such stream may become subject to the law of prescription, and the other laws relating to natural streams (*e*). A natural stream does not cease to be so by reason of its flowing for a part of its course over an artificial bed (*f*).

It is impossible, however, to create a new burden that is something short of an easement, that is to say, an easement which shall be enjoyed *nec per vim, nec clam, sed precario* (*g*). Where a right to an artificial watercourse is claimed by prescription, it is necessary to consider the circumstances under which it was created, whether it was made for a permanent, or only a temporary purpose. If it was made for a temporary purpose, the enjoyment would be precarious, and prescription would not apply. The expression "a temporary purpose," within the meaning of the rule, is not confined to a purpose which happens to last in fact for only a few years, but includes a purpose which is temporary in the sense that it may within the reasonable contemplation of the parties come to an end (*h*).

Canals.

The rule that the purpose for which the waters of an artificial watercourse have been collected or caused to flow, is to be regarded in determining whether rights or interests can be acquired in them by other persons than those who collected them or caused them to flow, applies with still greater force to the waters of canals than to artificial watercourses of an

(*e*) *Irimey* v. *Stocker*, 1 Ch. p. 409; 35 L. J. Ch. 467; *Blackburne* v. *Somers*, 5 L. R. Ir. 7; *Rameshur, etc., Singh* v. *Koonj Pattuck*, 4 A. C. 121; *Baily* v. *Clark*, (1902) 1 Ch. 649; 71 L. J. Ch. 396; *Whitmores (Edenbridge), Ltd.* v. *Stanford*, *supra*.

(*f*) *Beeston* v. *Weate*, 5 E. & B. 986; 25 L. J. Q. B. 115; *Briscoe* v. *Drought*, 11 Ir. C. L. 250; *Gared* v. *Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353; see *Mostyn* v. *Atherton*, (1899) 2 Ch. 360; 68 L. J. Ch. 629. As to a natural stream becoming a "sewer" by the discharge of sewage into it, see *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 495; 81 L. J. Ch. 40.

(*g*) *Burrows* v. *Lang*, (1901) 2 Ch. p. 511; 70 L. J. Ch. 607; *Whitmores (Edenbridge), Ltd.* v. *Stanford*, (1909) 1 Ch. p. 436; 78 L. J. Ch. 577.

(*h*) *Burrows* v. *Lang*, (1901) 2 Ch. pp. 502, 508; 70 L. J. Ch. 607; *Baily* v. *Clark*, (1902) 1 Ch. p. 668; 71 L. J. Ch. 396, and see *Whitmores (Edenbridge), Ltd.* v. *Stanford*, *supra*; see *Lewis* v. *Meredith*, (1913) 1 Ch. 571, 580; 82 L. J. Ch. 255.

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ordinary character (*i*). A canal company having a duty imposed on it by the legislature to keep open the canal, the legislature must be taken at least *primâ facie* to have intended that the powers and control over the waters of the canal should be vested in the company (*k*). A canal company which has enjoyed for a number of years the flow of the surplus waters of another canal lying on a higher level, has no right to insist on the continuance of the flow (*l*). Nor can a canal company make a grant of its water to adjacent proprietors in derogation of its statutory duties, nor can the right to such water be acquired against the company by prescription (*m*).

Fouling of artificial watercourse.

The fouling of the water of an artificial watercourse is a species of injury which does not stand upon the same footing as the abstraction of such water. Neither the party who created the watercourse, nor the upper riparian owners, nor the intermediate riparian owners may pollute the stream, so as to cast a greater burden on the owners below (*n*). The right, however, may be acquired by prescription (*o*).

Surface-water.

The principles which apply to water flowing in a known and defined channel do not apply to water of a temporary and casual character, which does not flow in a regular channel, or has no certain course, but which merely squanders itself

(*i*) *Staffordshire and Worcestershire Canal Co.* v. *Birmingham Canal Co.*, L. R. 1 H. L. 254; 35 L. J. Ch. 757.

(*k*) Ib.

(*l*) Ib. See *Att.-Gen.* v. *Plymouth Corporation*, 9 Beav. 67; 15 L. J. Ch. 109; 73 R. R. 285.

(*m*) *Rochdale Canal Co.* v. *King*, 14 Q. B. 122; 18 L. J. Q. B. 293; 80 R. R. 222, 233; *Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 287; 21 L. J. Q. B. 297; 88 R. R. 587; *Staffordshire and Worcestershire Canal Co.* v. *Birmingham Canal Co.*, *supra*; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, L. R. 7 H. L. 697; 45 L. J. Ch. 638; *Manchester Ship Canal Co.* v. *Rochdale Canal Co.*, (1899) 81 L. T. 472; *Rochdale Canal Co.* v. *Manchester Ship Canal Co.*, (1902) 85 L. T. 585; and see *Att.-Gen.* v. *Great Northern Railway*, (1909) 1 Ch. 775; 78 L. J. Ch. 577.

(*n*) *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305; 77 R. R. 809; *Blackburne* v. *Somers*, 5 L. R. Ir. 7; *Magor* v. *Chadwick*, 11 A. & E. 571; 9 L. J. Q. B. 159; *Whaley* v. *Laing*, 2 H. & N. 476; 26 L. J. Ex. 327; 115 R. R. 645, 675; *Baily* v. *Clark*, (1902) 1 Ch. 649; 71 L. J. Ch. 396.

(*o*) *Magor* v. *Chadwick*, *Wood* v. *Waud*, *Baily* v. *Clark*, *sup.*

over the surface of land (*p*). Water of this character may be drained away or appropriated before it reaches any defined channel of water (*q*).

Distinction between a watercourse and water of a casual character.

As distinguished from water of a casual and temporary character, a watercourse is a flow of water usually flowing in a certain direction, and by a regular channel, having a bed, banks, and sides, and possessing that unity of character by which the flow on one man's land can be identified with that on the land of his neighbour (*r*).

Water, though it may squander itself in flood time over the surface of land may nevertheless flow in a defined channel (*s*).

Subterranean percolating water.

The same principles which apply to water of a casual and temporary character which squanders itself over the surface, are equally, if not more strongly, applicable to subterraneous water of the same casual and undefined description, which does not flow in a well-defined and known (*t*) channel, but merely percolates or oozes through the soil more or less according to the quantity of rain that may chance to fall. A man may by operations on his own soil, or in the execution of work which he is authorised to make, intercept, drain away, and appropriate as much of such water as he pleases, notwithstanding the effect may be not only to prevent it reaching his neighbour's land, but even to cause the water already collected there in wells and ponds to percolate away, so as to leave his neighbour's land dry (*u*).

(*p*) *Broadbent* v. *Ramsbotham*, 11 Ex. 602; 25 L. J. Ex. 115; 105 R. R. 673; *Dudden* v. *Clutton Union*, 1 H. & N. p. 630; 26 L. J. Ex. 146; 108 R. R. 752; *Chasemore* v. *Richards*, 7 H. L. 349; 29 L. J. Ex. 81; 115 R. R. 187; *Bradford Corporation* v. *Pickles*, (1895) A. C. 587; 64 L. J. Ch. 759; *English* v. *Metropolitan Water Board*, (1907) 1 K. B. pp. 588, 602; 76 L. J. K. B. 361.

(*q*) Ib. *Rawstron* v. *Taylor*, 11 Ex. 375; 25 L. J. Ex. 33; 105 R. R. 567; *McNab* v. *Robertson*, (1897) A. C. 129; 66 L. J. P. C. 27.

(*r*) *Briscoe* v. *Drought*, 11 Ir. C. L. p. 271; *Taylor* v. *St. Helen's Corporation*, 6 C. D. 264; see *McNab* v. *Robertson*, (1897) A. C. p. 134; 66 L. J. P. C. 27.

(*s*) *Briscoe* v. *Drought*, 11 Ir. C. L. 250.

(*t*) See *Bradford Corporation* v. *Ferrand*, (1902) 2 Ch. 655; 71 L. J. Ch. 859; *Mansell* v. *Valley Printing Co.*, (1908) 2 Ch. p. 448; 77 L. J. Ch. pp. 745, 746.

(*u*) *Acton* v. *Blundell*, 12 M. & W. 324; 13 L. J. Ex. 289; 67 R. R. 361; *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J. Ex. 81;

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The right which a man has to divert or appropriate percolating water within his own land so as to deprive his neighbour of such water is the same whether his motive is *bonâ fide* to improve his own land, or maliciously to injure his neighbour, or to induce his neighbour to buy him out (*x*). But he may not draw off the water flowing underground in a certain and well-defined channel through his neighbour's land. If he cannot get at the underground water without touching the water in a known (*y*) and defined channel, he cannot get it at all (*z*).

Where the water in a natural stream was caused to sink into the ground by the defendant's pumping operations from a well in his own land near the stream, but none of the water of the stream was appropriated by the defendant, it was held that the plaintiff a riparian owner, had no cause of action for the injury to the stream caused by the defendant so withdrawing the support of the lower subterranean water (*a*).

Pollution of percolating water.

The case is different where polluted water penetrates into the earth on one man's land, and percolates through to the wells and springs of his neighbour. Though water percolating in the soil is a common reservoir or source which any landowner may intercept and appropriate, but in which no landowner has any property, no landowner has a right by any operations on his land to contaminate this common reservoir or source. Every owner of land under which such water percolates has a right to have it in its natural condition, and no one is entitled to intertere with that right by polluting that

115 R. R. 187; *New River Co.* v. *Johnson*, 2 El. & El. 435; 29 L. J. M. C. 93; 119 R. R. 786; *Reg.* v. *Metropolitan Board of Works*, 3 B. & S. 710; 32 L. J. Q. B. 105; *Ewart* v. *Belfast Poor Law Guardians*, 9 L. R. Ir. 180; *Ballard* v. *Tomlinson*, 29 C. D. pp. 120, 123; 54 L. J. Ch. 404; *English* v. *Metropolitan Water Board*, (1907) 1 K. B. p. 602; 76 L. J. K. B. 361; *Mansell* v. *Valley Printing Co.*, (1908) 2 Ch. 448; 77 L. J. Ch. 748.

(*x*) *Bradford Corporation* v. *Pickles*, (1895) A. C. 587; 64 L. J. Ch. 759; *Salt Union Co.* v. *Brunner Mond & Co.*, (1906) 2 K. B. p. 833; 76 L. J. K. B. p. 65.

(*y*) See *Bradford Corporation* v. *Ferrand*, (1902) 2 Ch. 655; 71 L. J. Ch. 859.

(*z*) *Grand Junction Canal Co.* v. *Shugar*, 6 Ch. 486; see *Jordeson* v. *Sutton, etc., Gas Co.*, (1899) 2 Ch. 217, 239; 68 L. J. Ch. 457.

(*a*) *English* v. *Metropolitan Water Board*, (1907) 1 K. B. 588; 76 L. J. K. B. 361.

common source (*b*). A landowner has a right to draw up the water lying under his land in its natural condition, and may in the exercise of that natural right use pumps or other appliances for the purpose (*c*). In a case accordingly, where the plaintiff and the defendant had each a well on his land, and the defendant turned sewage into his well, which percolating through the soil polluted the water which the plaintiff pumped up from his well, an injunction was granted restraining the defendant from thus polluting the water which formed the supply of the plaintiff's well (*d*).

Drainage.

When land is so located that water naturally or in the course of ordinary agricultural operations, such as by deep ploughing, descends from the estate of the superior proprietor to the inferior estate, the owner of the latter cannot do anything to prevent the course of such water. If he build a wall at the upper part of his estate so as to prevent the water from descending on it, whereby the land above is damaged, there is an actionable injury. The owner of land lying on a lower level is subject to the burden of receiving water which drains naturally or in the course of ordinary agricultural operations, such as by deep ploughing, from land on a higher level. The upper proprietor may drain his land, and the proprietor below must receive the water so drained; but the upper proprietor may not, by adopting a particular system of drainage, or by introducing alterations in the mode of drainage, cause the drainage water to flow on his neighbour's land in an injurious manner, or obstruct the drainage of other lands by overloading the ancient drains with water (*e*).

Water in mines.

A mineowner has a right to work his mines in the manner most convenient and beneficial to himself for the purpose of getting out the whole of the minerals from his mine, and is not responsible for any damage occasioned by water which

(*b*) *Hodgkinson* v. *Ennor*, 32 L. J. Q. B. 231; 4 B. & S. 229; *Ballard* v. *Tomlinson*, 29 C. D. 115; 54 L. J. Ch. 404.

(*c*) *Ballard* v. *Tomlinson*, *supra*.

(*d*) Ib.

(*e*) *Dawson* v. *Paver*, 5 Ha. 415; 16 L. J. Ch. 274; 71 R. R. 155; *Smith* v. *Kenrick*, 7 C. B. 515; 18 L. J. C. P. 172; 78 R. R. 745. See *Ripon* (*Earl*) v. *Hobart*, 3 M. & K. 169; 3 L. J. Ch. 145; 41 R. R. 40; *Whalley* v. *Lancashire and Yorkshire Railway Co.*, 13 Q. B. D. 131; 53 L. J. Q. B. 285.

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flows by gravitation or natural causes into an adjoining mine, provided the mines have been worked with due skill in the usual and ordinary manner (*f*). It is immaterial that his own acts have conduced to produce the injury, if his acts have been only those of the proper and ordinary working of his own mine without default or negligence (*g*). But he may not pump water out of his mines into the adjoining mines, so as to increase the flow into them, or use any artificial means or do anything whereby water should be caused to go into the adjoining mines, which would not otherwise have arrived there by natural causes (*h*). Where for his own convenience he makes a new artificial watercourse, he must take care that he constructs it in such a manner that it shall be capable of conveying off the water that might flow into it from all such floods or rainfalls as might reasonably be expected to happen in the locality (*i*). The owner of the lower mine must, if he wishes to guard against the natural flow of water from the mines of his neighbour, have a barrier in the upper part of his mine to pen back the water (*k*).

Escape of water.

If a man for his own purposes makes a reservoir on his land and collects water there, he must use all reasonable care to keep it safely there. If he does not do so, and the water escapes, he is answerable for all the damage which is the natural consequences of its escape (*l*), unless he can show that the escape was caused by an agent beyond his control,

(*f*) *Smith* v. *Kenrick*, 7 C. B. p. 564; 18 L. J. C. P. 172; 78 R. R. 745; *Baird* v. *Williamson*, 15 C. B. (N. S.) 376; 33 L. J. C. P. 101; *Wilson* v. *Waddall*, 2 A. C. p. 99; and see *John Young & Co.* v. *Bankier Distillery Co.*, (1893) A. C. p. 697; 69 L. T. 838; and the *Salt Union Co.* v. *Brunner Mond & Co.* (1906), 2 K. B. p. 832; 76 L. J. K. B. p. 65; *Greyvensteyn* v. *Hattingh*, (1911) A. C. p. 359; 80 L. J. P. C. p. 160.

(*g*) *Fletcher* v. *Smith*, 2 A. C. 781; 47 L. J. Ex. 4.

(*h*) *Baird* v. *Williamson*, 15 C. B. (N. S.) 391; 33 L. J. C. P. 101; *Westminster Brymbo Coal Co.* v. *Clapton*, 36 L. J. Ch. 477; *Lomax* v. *Stott*, 39 L. J. Ch. 835; *Crompton* v. *Lea*, 19 Eq. 115, 127; 44 L. J. Ch. 69, *West Cumberland Iron Co.* v. *Kenyon*, 11 C. D. 782; 48 L. J. Ch. 793; *John Young & Co.* v. *Bankier Distillery Co.*, (1893) A. C. pp. 691, 697; 69 L. T. 838.

(*i*) *Fletcher* v. *Smith*, *supra*.

(*k*) *Baird* v. *Williamson*, 15 C. B. (N. S.) 392; 33 L. J. C. P. 101.

(*l*) *Rylands* v. *Fletcher*, L. R. 3 H. L. 339; 37 L. J. Ex. 131; *Snow* v. *Whitehead*, 27 C. D. 588; 53

such as a storm, which amounts to *vis major*, or the act of God, in the sense that it is practically, though not physically, impossible to resist it; or the wrongful act of a third person which could not have been provided against (*m*); or unless what he has done, though it may in point of law be wrongful, has not caused any additional damage (*n*); or unless what has happened is only the inevitable result of what the legislature has authorised him to do (*o*); or unless the plaintiff has consented to the water being stored on the defendant's premises, and its escape has not been due to any negligence of the defendant (*p*). But the rule in *Rylands* v. *Fletcher*, that a person who for his own purpose, brings on his land and keeps there anything likely to cause mischief if it escapes, must keep it at his peril, does not extend to make the owner of land liable for consequences brought about by the collecting and impounding on his land, by another, of water, or any other dangerous element, not for the purposes of the owner of the land, but for the purposes of such other person (*q*).

L. J. Ch. 885. Cf. *Anderson* v. *Oppenheimer*, 5 Q. B. D. 607; 49 L. J. Q. B. 708; *R. H. Buckley* v. *Buckley*, (1898) 2 Q. B. 608; 67 L. J. Q. B. 953; *Blake* v. *Woolf*, (1898) 2 Q. B. 426, 428; 67 L. J. Q. B. 613; and see the following cases where the principle of *Rylands* v. *Fletcher* was applied; *National Telephone Co.* v. *Baker*, (1893) 2 Ch. 186; 62 L. J. Ch. 699; *East and South African Telegraph Co.* v. *Cape Town Tramways Co.*, (1902) A. C. 381; 71 L. J. P. C. 122; *Midwood Co.* v. *Manchester Corporation*, (1905) 2 K. B. 597; 74 L. J. K. B. 884 (electric current); *Hobart* v. *Southend Corporation*, (1906) 75 L. J. K. B. 305; *Foster* v. *Warblington Urban Council*, (1906) 1 K. B. p. 670; 75 L. J. K. B. 514 (escape of sewage); *West* v. *Bristol Tramways Co.*, (1908) 2 K. B. 14, 20; 77 L. J. K. B. 684 (fumes from creosote); *Jones* v. *Llanrwst*, (1911) 1 Ch. p. 403; 80 L. J. Ch. p. 149 (escape of sewage).

(*m*) *Nicholls* v. *Marsland*, 2 Ex. D. 1; 46 L. J. Ex. 174; *Rylands* v. *Fletcher*, *supra*; *Box* v. *Jubb*, 4 Ex. D. 76; 48 L. J. Ex. 417. See *Rothes (Countess)* v. *Kirkaldy Waterworks*, 7 A. C. 694; *Whitmores (Edenbridge), Ltd.* v. *Stanford*, (1909) 1 Ch. p. 438; 78 L. J. Ch. p. 1.2; *Rickards* v. *Lothian*, (1913) A. C. 263; 82 L. J. P. C. 42 (wrongful act of third person).

(*n*) *Thomas* v. *Birmingham Canal Co.*, 49 L. J. Q. B. p. 856.

(*o*) *Dixon* v. *Metropolitan Board of Works*, 7 Q. B. D. 418, *ante*, p. 161; and see *Price's Patent Candles Co.* v. *London County Council*, (1908) 2 Ch. p. 536; 78 L. J. Ch. 1.

(*p*) *Blake* v. *Woolf*, (1898) 2 Q. B. 426, 428; 67 L. J. Q. B. 813.

(*q*) *Whitmores (Edenbridge), Ltd.*

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Where, however, a man who has collected water for his own purposes, fails to exercise due care to keep it safely, and damage arises, it is no answer to say that the immediate cause of the damage was the negligent act of a third person (*r*).

As between occupiers of different floors of the same house, the occupier of the upper floor is not liable for an escape of water from his cistern to the premises of the other, unless negligence can be shown, the water having been brought on to the upper floor in the ordinary user of the premises (*s*).

A plaintiff who had no proprietary title to use the water coming from the defendant's land, and who used the water without the leave or licence of the defendant, was held to have no cause of action against the defendant for damage sustained owing to the water having been polluted by the defendant on his land (*t*).

Flood water.

Proprietors on the banks of a river or canal are entitled to protect their property from an invasion of water by building a bulwark, provided they conduct their operations in a reasonable manner (*u*). But a riparian proprietor may not dam or pen up water so as to flood or otherwise injuriously affect the lands of others (*x*), or by making embankments, or other-

v. *Stanford*, (1909) 1 Ch. p. 438; 78 L. J. Ch. p. 152.

(*r*) *Evans* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, 36 C. D. 626; 57 L. J. Ch. 153; see *Barker* v. *Herbert*, (1911) 2 K. B. p. 643; 80 L. J. K. B. 1329; *Rickards* v. *Lothian*, note (*m*), *supra*.

(*s*) *Carstairs* v. *Taylor*, L. R. 6 Ex. 217; 40 L. J. Ex. 129; *Ross* v. *Fedden*, L. R. 7 Q. B. 661, 665; 41 L. J. Q. B. 270; *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602; 49 L. J. Q. B. 708 (C. A.); *Blake* v. *Woolf*, *supra*: see *Rickards* v. *Lothian*, *supra*.

(*t*) *Fergusson* v. *Malvern Urban District Council* (1908), 72 J. P. 273; (1909), 73 J. P. 361 (H. L.).

(*u*) *Nield* v. *London and North Western Railway Co.*, L. R. 10 Ex. 4; 44 L. J. Ex. 15; *Maxey Drainage Board* v. *Great Northern Railway Co.*, (1912) 106 L. T. 429; 56 S. J. 275. As to right of landowner to protect his lands from sea, although by so doing he may injure his neighbour, see *Rex* v. *Pagham Commissioners*, 8 B. & C. 355; 6 L. J. K. B. 338. See also *Greyvensteyn* v. *Hattingh*, (1911) A. C. 360; 80 L. J. P. C. 158 (locusts), where the right of an owner to protect his land from danger is laid down.

(*x*) *Robinson* v. *Byron* (*Lord*), 1 Bro. C. C. 588; *Williams* v. *Morland*, 2 B. & C. 910; 2 L. J. K. B. 191; 26 R. R. 578; see *Ware* v. *Regents Canal Co.*, 3 De G. & J. 212; 28 L. J. Ch. 212; 121 R. R. 80.

wise alter the ancient course of flood water, so as to throw it in greater quantity upon the land of his neighbour (*y*). In *Whalley* v. *Lancashire and Yorkshire Railway Company* (*z*) there had been an unprecedented rainfall, causing water to accumulate against the side of the railway company's embankment, and the company, in order to protect their embankment, cut trenches in it, by which the water flowed through and found its way on to the land of the plaintiff, which was on a lower level. The jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently. The Court held, however, that, although the defendants had not brought the water on their land, they had no right to protect their property by actively transferring the mischief from their own land to that of the plaintiff, and that the defendants were liable accordingly. But if an extraordinary flood is seen to be coming, a landowner may protect his land from it, by all reasonable means, and so turn it away without being responsible for the consequences (*a*).

On grant of land on natural stream, ordinary rights in stream pass without express mention in the grant.

Where a riparian owner sells part of his estate including land on the bank of a natural stream it is not necessary to make any express provision as to the grant or reservation of the ordinary rights of a riparian owner in the stream, as such rights are not easements to be granted or reserved as appurtenant to the land sold or retained, but are parts of the fee simple of such land (*b*). But the rights of parties in the water may be created or modified by deed, and where there is a deed of grant, the nature and extent of the interest and the rights and liabilities of the parties thereto are regulated

Deed of grant of water.

(*y*) *Trafford* v. *Rex*, 8 Bing. 204; 1 L. J. (N. S.) Ex. 90; *Menzies* v. *Breadalbane* (*Lord*), 3 Bligh N. S. 414; 32 R. R. 103; *Wicks* v. *Hunt*, John. 372; 125 R. R. 157; *Lawrence* v. *Great Northern Railway Co.*, 16 Q. B. 643; 20 L. J. Q. B. 293; 83 R. R. 645; *Greyvensteyn* v. *Hattingh*, (1911) A. C. p. 359; 80 L. J. P. C. p. 159.

(*z*) 13 Q. B. D. 131; 53 L. J. Q. B. 285; and see *Greyvensteyn* v. *Hattingh*, *supra*.

(*a*) *Whalley* v. *Lancashire and Yorkshire Railway Co.*, 13 Q. B. D. p. 131; 53 L. J. Q. B. 285; *Greyvensteyn* v. *Hattingh*, (1911) A. C. p. 360; 80 L. J. P. C. 158; *Maxey Drainage Board* v. *Great Northern Railway Co.*, (1912) 106 L. T. 429; 56 S. J. 275.

(*b*) *Portsmouth Waterworks Co.* v. *London, Brighton, etc., Railway Co.*, (1910) 26 T. L. R. 173.

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wholly thereby, whether the water be a natural stream (*c*), or an artificial watercourse (*d*), or water of a casual and temporary character (*e*). The owner of land cannot, however, create rights in water unconnected with the ordinary use and enjoyment of land (*f*), so as to constitute property in the hands of the grantee. As between himself and his grantee the grant is good, but as against third parties it will not be enforced (*g*). A mere licensee of water, for instance, cannot maintain an action against a third party by whom the water has been polluted (*h*).

Implication of grant.

An easement in water being an easement of a continuous nature, the right passes by implication of law without any general words of conveyance (and independently of sect. 6 of the Conveyancing Act, 1881) upon the grant of the land, house, or mill to which the easement is annexed (*i*). Where, accordingly, the owner of two mills upon the same stream demised the upper mill, he was held to have granted all such conveniences and rights over the lower mill as were necessary for the reasonable enjoyment of the upper mill in the state in which it was at the time of the demise (*k*). So, also, where

(*c*) *Northam* v. *Hurley*, 1 E. & B. 665; 22 L. J. Q. B. 183; *Sharp* v. *Waterhouse*, 7 E. & B. 816; 27 L. J. Q. B. 70; 110 R. R. 844; *Walker* v. *Stewart*, 2 Macq. 424; *Taylor* v. *St. Helen's Corporation*, 6 C. D. 264; *Remfrey* v. *Surveyor-General of Natal*, (1896) A. C. 558; 65 L. J. P. C. 72.

(*d*) *Lee* v. *Stevenson*, El. Bl. & El. 512; 27 L. J. Q. B. 263; 113 R. R. 752; *Chadwick* v. *Marsden*, L. R. 2 Ex. 284; 36 L. J. Ex. 177; *Wood* v. *Saunders*, 10 Ch. 582; 44 L. J. Ch. 514; *Taylor* v. *St. Helen's Corporation*, 6 C. D. 264; 46 L. J. Ch. 857.

(*e*) *Rawstron* v. *Taylor*, 11 Ex. 369; 25 L. J. Ex. 33; 105 R. R. 567.

(*f*) *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, L. R. 7 H. L. 704; *McCartney* v. *Londonderry and Lough Swilly Railway Co.*, (1904) A. C. 301, 314; 73 L. J. P. C. 73.

(*g*) *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300; *Ormerod* v. *Todmorden Co.*, 11 Q. B. D. 155; 52 L. J. Q. B. 445; see *McCartney* v. *Londonderry and Lough Swilly Railway Co.*, (1904) A. C. p. 315; 73 L. J. P. C. 73.

(*h*) *Laing* v. *Whaley*, 3 H. & N. 675, 901; 27 L. J. Ex. 422; 117 R. R. 918, 926.

(*i*) *Watts* v. *Kelson*, 6 Ch. 174; *Key* v. *Neath*, (1905) 93 L. T. 509; (1906) 95 L. T. 771.

(*k*) *Hall* v. *Lund*, 1 H. & C. 676; 32 L. J. Ex. 113; *Jones* v. *Pritchard*, (1908) 1 Ch. p. 638; 77 L. J. Ch. 405.

a man being the owner of a house or building and of land surrounding it, through which a conduit or drain from the house passed, sold the house or building, retaining the land, the right to use the drain or conduit was held to pass as a privilege annexed to the house or building and necessary to its beneficial use (*l*). So, also, where the owner of properties A and B made a drain from a tank on B to a lower tank on the same property, and laid pipes from the lower tank to cattle sheds on property A, for the purpose of supplying them with water, and afterwards sold A to the plaintiff, the right to have the accustomed flow of the watercourse through the pipes was held to pass by implication of law without regard to the purpose for which the plaintiff might wish to use it (*m*). And where a private Canal Act provided that each owner of land through which the canal was made should be entitled to a right of exclusive fishery in so much of the canal as passed through his land, such right to be exercised so that the towing paths should not be prejudiced or obstructed, it was held that the Act conferred upon the grantees of the fishery a right to use the towing paths for fishing purposes (*n*), but a grant merely of the exclusive right of fishery in the canal would not in itself have carried with it the right to use the towing paths, unless possibly such right of fishery was wholly incapable of being exercised without entering upon the company's land (*o*).

A temporary and precarious easement, being a right unknown to the law, cannot pass by implied grant, or under the general words of sect. 6 of the Conveyancing Act, 1881. Where, accordingly, the owner of an ancient mill and a farm, the cattle of which were to some extent watered at an ancient watercourse diverted from a natural stream and running on the mill property alongside the farm, but constructed and maintained solely for the purposes of the mill, conveyed the

(*l*) *Nicholas* v. *Chamberlain*, Cro. Jac. 121; *Ewart* v. *Cochrane*, 4 Macq. 117: *Watts* v. *Kelson*, 6 Ch. p. 174.

(*m*) *Watts* v. *Kelson*, 6 Ch. p. 175; and see *Key* v. *Neath*, 93 L. T. 509; (1906), 95 L. T. 771.

(*n*) *Staffordshire and Worcestershire Canal Co.* v. *Bradley*, (1912) 1 Ch. 91; 81 L. J. Ch. 147.

(*o*) Ib., (1912) 1 Ch. p. 100; 81 L. J. Ch. 147.

farm to a purchaser without mentioning any water right, it was held that, having regard to the special temporary purpose for which the watercourse was constructed, the expense of maintaining it, and the fact that it lay entirely on the mill property, the purchaser had acquired no right either by implied grant or under the Conveyancing Act, 1881, s. 6, to have it continued for his benefit, and no right to the use of the water (if any) therein (*p*).

Injunctions to restrain fouling a stream.

An injunction will be granted to restrain the fouling of a stream so as to render the water unfit for domestic purposes (*q*), or for cattle to drink (*r*) or for fish to live in it (*s*), or for the purposes of manufacture (*t*), so also an injunction will be granted to restrain the discharge of heated water into a stream (*u*), or the pollution of a water supply by the escape of gas (*x*). A riparian owner may maintain an action to restrain the pollution of a stream without proving that he has sustained actual damage by the wrongful act (*y*), and the fact that the stream has been fouled by other persons is no

Action maintainable without proof of actual damage by plaintiff.

Pollution by others no defence to action.

(*p*) *Burrows* v. *Lang*, (1901) 2 Ch. 502; 70 L. J. Ch. 607; *International Tea Stores* v. *Hobbs*, (1903) 2 Ch. pp. 171, 172; 72 L. J. Ch. 543; see *Lewis* v. *Meredith*, (1913) 1 Ch. 571, 580; 82 L. J. Ch. 255.

(*q*) *Goldsmid* v. *Tunbridge Wells Commissioners*, 1 Ch. 349; 35 L. J. Ch. 382; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. 393; 80 L. J. Ch. 145.

(*r*) *Oldaker* v. *Hunt*, 6 De G. M. & G. 376; 106 R. R. 124; *Att.-Gen.* v. *Borough of Birmingham*, 4 K. & J. 528; *Att.-Gen.* v. *Leeds Corporation*, 5 Ch. 583, 586; 39 L. J. Ch. 711; *Jones* v. *Llanrwst Urban Council*, *supra*.

(*s*) *Aldred's Case*, 9 Co. R. 59 a; *Oldaker* v. *Hunt*, *Att.-Gen.* v. *Borough of Birmingham*, *Att.-Gen.* v. *Leeds Corporation*, *supra*, *Fitzgerald* v. *Firbank*, (1897) 2 Ch. 96, 102; 66 L. J. Ch. 529.

(*t*) *Wood* v. *Sutcliffe*, 2 Sim. N. S. 163; 21 L. J. Ch. 253; *Tipping* v. *Eckersley*, 2 K. & J. 264; *Crossley* v. *Lightowler*, 2 Ch. 478; 36 L. J. Ch. 584; *Clowes* v. *Staffordshire Potteries Co.*, 8 Ch. 142; 42 L. J. Ch. 107; *Pennington* v. *Brinsop Hall Coal Co.*, 5 C. D. 769; 46 L. J. Ch. 773; *John Young & Co.* v. *Bankier Distillery Co.*, (1893) A. C. 691; see *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. 526; 78 L. J. Ch. 1.

(*u*) *Tipping* v. *Eckersley*, 2 K. & J. 264; 110 R. R. 216.

(*x*) *Batcheller* v. *Tunbridge Wells Gas Co.*, 84 L. T. 765.

(*y*) *Crossley* v. *Lightowler*, 2 Ch. 478; 36 L. J. Ch. 584; *Clowes* v. *Staffordshire Potteries Co.*, 8 Ch. pp. 142, 143; 42 L. J. Ch. 107; *Pennington* v. *Brinsop Hall Coal Co.*, 5 C. D. pp. 769, 774; 46 L. J. Ch. 773; *Att.-Gen.* v. *Acton Local Board*, 22 C. D. p. 231; 52 L. J. Ch. 108; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. pp. 402, 411; 80 L. J. Ch. 145.

defence to the action (*z*), but where a stream is already polluted, no offence is committed against sect. 17 of the Public Health Act, 1875, by discharging into it polluted water, unless the stream is thereby made fouler than it was before (*a*).

Form of Order.

In granting injunctions against local authorities for the pollution of rivers by sewage matter, the practice is to grant an immediate injunction restraining any new communications with the river, but as to existing drains, to suspend the operation of the order for a longer or shorter period to enable the defendants to comply with the order by altering their works. Liberty to apply for a further suspension of the injunction is sometimes reserved, and if it be not reserved, further time is usually granted on the terms of paying the costs of the application (*b*).

An injunction generally granted in cases of pollution.

In the case of injury to riparian rights from the pollution of water, the Court does not, except in special cases, award damages in lieu of an injunction (*c*).

Public Health Act, 1875, sect. 17.

Under the Public Health Act, 1875, a local authority has power to discharge sewage into a natural stream provided all foul or noxious matter has been removed in accordance with

(*z*) *Crossley* v. *Lightowler, supra*; *Att.-Gen.* v. *Leeds Corporation*, 5 Ch. 583; 39 L. J. Ch. 711.

(*a*) *Att.-Gen.* v. *Birmingham, Tame, etc., District Drainage Board*, (1910) 1 Ch. 48; 79 L. J. Ch. 137; (1912) A. C. p. 806; 82 L. J. Ch. p. 53.

(*b*) *Spokes* v. *Banbury Board of Health*, 1 Eq. 42; 35 L. J. Ch. 105; *Goldsmid* v. *Tunbridge Wells Commissioners*, 1 Eq. 161; 1 Ch. 349; 35 L. J. Ch. 382; *Att.-Gen.* v. *Colney Hatch Asylum*, 4 Ch. 146; 38 L. J. Ch. 265; *Att.-Gen.* v. *Corporation of Leeds*, 5 Ch. 583; 39 L. J. Ch. 711; *Pennington* v. *Brinsop Hall Coal Co.*, 5 C. D. 769, 774; 46 L. J. Ch. 773; *Att.-Gen.* v. *Acton Local Board*, 22 C. D. 221; 52 L. J. Ch. 108; *Att.-Gen.* v. *Finchley Local Board*, 3 T. L. R. 357; *Att.-Gen.* v. *Willesden Urban Council*, 12 T. L. R. 528; *Att.-Gen.* v. *Birmingham, Tame, etc., District Drainage Board*, note (*a*), *supra*; *Stancomb* v. *Trowbridge Urban Council*, (1910) 2 Ch. p. 191; 79 L. J. Ch. 519; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 411; 80 L. J. Ch. 145; (1912) 76 J. P. Jo. 243 (where an undertaking in damages was required on further suspension); *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. p. 509, (1912) 81 L. J. Ch. 40.

(*c*) *Pennington* v. *Brinsop Hall Coal Co.*, 5 C. D. p. 773; 44 L. J. Ch. 773; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 411; 80 L. J. Ch. 145. See *Chapman* v. *Auckland Union*, 23 Q. B. D. 294; 58 L. J. Q. B. 504; *Harrington* (*Earl*) v. *Derby Corporation*, (1905) 1 Ch. p. 221; 74 L. J. Ch. 219.

the provisions of sect. 17 of the Act (*d*). The prohibition in sect. 17 is against the discharge into a natural stream of sewage which will prejudicially affect or deteriorate the quality of the water; where therefore filthy water is discharged into a stream which is already polluted, no offence is committed against the section unless the stream is thereby made fouler than it was before (*e*).

Injunction not granted to compel local authority to provide proper drainage system.

The Court will not grant a mandatory injunction against a public body to compel them to perform their statutory duty of providing a proper system of drainage (*f*). Thus where a local board did no act themselves to cause a nuisance, but merely neglected to perform their duty of providing a proper system of drainage and permitted the state of things to continue which existed before the commencement of their powers, it was held that an action would not lie by a riparian owner for damages or an injunction to restrain the board allowing sewage to pollute the river, the action being in substance not based on a private wrong, but being one for a mandatory injunction to compel the board to carry out their statutory duties as to the drainage of their district, relief which should be obtained by the prerogative writ of mandamus (*g*), or by

(*d*) See *Durrant* v. *Branksome Urban Council*, (1897) 2 Ch. 291; 66 L. J. Ch. 653; *Att.-Gen.* v. *Birmingham, Tame, etc., District Drainage Board*; *Jones* v. *Llanrwst Urban Council*, notes (*a*), (*b*), *supra*; *Phillimore* v. *Watford District Council*, (1913) 2 Ch. 434; and see sect. 332 Public Health Act, 1875. See also *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 495; (1912) 81 L. J. Ch. 40, as to discharge of sewage into a stream in which part of the year only sewage flowed.

(*e*) *Att.-Gen.* v. *Birmingham, Tame, etc., District Drainage Board*, (1910) 1 Ch. 48; 79 L. J. Ch. 137; (1912) A. C. 806; 82 L. J. Ch. 53.

(*f*) *Glossop* v. *Heston and Isleworth Local Board*, 12 C. D. 102; 49 L. J. Ch. 89; *Att.-Gen.* v. *Dorking Union*, 20 C. D. 595; 51 L. J. Ch. 585; *Att.-Gen.* v. *Clerkenwell Vestry*, (1891) 3 Ch. p. 537; 60 L. J. Ch. 788; *Harrington* (*Earl*) v. *Derby Corporation*, (1905) 1 Ch. pp. 223, 224; 74 L. J. Ch. 219; *Foster* v. *Warblington Urban Council*, (1906) 1 K. B. p. 669; 75 L. J. K. B. 514, 524; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. pp. 405, 406; 80 L. J. Ch. 145; and see *Dawson* v. *Bingley Urban Council*, (1911) 2 K. B. pp. 155, 161; 80 L. J. K. B. pp. 850, 852; *M'Clelland* v. *Manchester Corporation*, (1912) 1 K. B. p. 133; 81 L. J. K. B. p. 106.

(*g*) *Glossop* v. *Heston and Isleworth Local Board*; *Att.-Gen.* v. *Dorking Union*, *supra*; see these cases explained. *Foster* v. *Warbling-*

complaint to the Local Government Board under sect. 299 of the Public Health Act, 1875, or by proceedings under the Rivers Pollution Prevention Acts, 1876 and 1893 (*h*).

Public Health Act, 1875, s. 299.

But although sect. 299 of the Public Health Act, 1875, provides a remedy in the case of a local authority making default in providing their district with proper sewers, or "in the maintenance of existing sewers," a private individual is entitled to damages, and an injunction to restrain a local authority committing a nuisance by allowing sewage to escape from their sewers to his injury (*i*), notwithstanding the statutory or prescriptive right of the inhabitants in the district to turn their sewage into the sewers of the local authority (*k*).

Canals.

Other cases of nuisance to water which have been brought before the Court are obstructions and nuisances to canals (*l*). A canal company authorised but not ordered by Act of Parliament to supply their canal with water from a stream which was pure at the date of their Act, cannot, after the stream has been polluted, though by the act of others, continue to supply

ton Urban Council, (1906) 1 K. B. pp. 669, 676; 75 L. J. K. B. p. 524; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. pp. 405, 409; 80 L. J. Ch. 145; *Dawson* v. *Bingley Urban Council*, (1911) 2 K. B. 155—161; 80 L. J. K. B. 850, 852.

(*h*) See *Harrington* (*Earl*) v. *Derby Corporation*, (1905) 1 Ch. pp. 205, 221—224; 74 L. J. Ch. 219.

(*i*) *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. pp. 393, 409; 80 L. J. Ch. 145; *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 495, (1912) 81 L. J. Ch. 40; and see *Gibbings* v. *Hungerford*, (1904) 1 I. R. p. 211.

(*k*) *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. pp. 409, 410; 80 L. J. Ch. 145; *Harrington* (*Earl*) v. *Derby Corporation*, (1905) 1 Ch. p. 220; 74 L. J. Ch. 219 (explained in *Hobart* v. *Southend-on-Sea Corporation*, (1906) 75 L. J. K. B. p. 309), and cf. *Att.-Gen.* v. *Dorking Union*, in which case an injunction was not granted against the local authority where the inhabitants had acquired prescriptive rights to carry their sewage into "the river" through the defendants' sewers. See as to this decision *Jones* v. *Llanrwst Urban Council*, *supra*.

(*l*) See *London and Birmingham Railway Co.* v. *Grand Junction Canal Co.*, 1 Ra. Ca. 224; *Manchester, Sheffield, etc., Railway Co.* v. *Worksop Board of Health*, 23 Beav. 198; 26 L. J. Ch. 345; *Case* v. *Midland Railway Co.*, 27 Beav. 247; 28 L. J. Ch. 727; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, L. R. 7 H. L. 697; 45 L. J. Ch. 638; *Att.-Gen.* v. *Basingstoke Corporation*, 45 L. J. Ch. 727; *North Staffordshire Railway Co.* v. *Hanley Corporation*, (1910) 26 T. L. R. 20; *Staffordshire and Worcestershire Canal Co.* v. *Bradley*, (1912) 1 Ch. 91; 81 L. J. Ch. 147.

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their canal from its water, if they cause thereby a public nuisance (*m*). It is no answer to say that the company did not pollute the water, they having the power to draw or not to draw the water into their canal as they please, or that by restraining the canal company, a worse nuisance would be created, or that the company may be obliged to close their canal and expose themselves to an indictment on that ground (*n*).

Injunction to restrain water company disconnecting pipes and cutting off supply.

An injunction will be granted to restrain a water company preventing a householder connecting his service-pipe with the company's main, in accordance with his statutory rights (*o*). And notwithstanding the statutory remedy provided by sect. 68 of the Waterworks Clauses Act, 1847, for the settlement of disputes by justices, and the special remedy by penalties given by sect. 43 against a company withholding water, the Court will grant an injunction to restrain a water company from cutting off the supply of water to a house, but the injunction will only be granted on the plaintiff giving an undertaking to take immediate proceedings before the justices to have the question determined as to the proper sum to be paid by him for the water (*p*).

Injunction to restrain injury to fishery.

The Court will grant an injunction to restrain a defendant damaging a plaintiff's fishery, notwithstanding that the acts complained of are offences under the Salmon Fishery Acts, for which penalties are prescribed on conviction in summary proceedings before justices, but some definite damage clearly attributable to the illegal act must be shown (*q*).

Rivers Pollution Prevention Acts, 1876 & 1893.

By the Rivers Pollution Prevention Act, 1876 (*r*), every

(*m*) *Att.-Gen.* v. *Proprietors of Bradford Canal Co.*, 2 Eq. 71; 35 L. J. Ch. 619.

(*n*) Ib.

(*o*) *Gale* v. *Rhymney Gas and Water Co.*, (1903) 89 L. T. 399.

(*p*) *Hayward* v. *East London Waterworks Co.*, 28 C. D. 139; 54 L. J. Ch. 523.

(*q*) *Fraser* v. *Fear*, (1912) 107 L. T. 425, 428; W. N. 228. As to injunction against lessee obstructing his lessor exercising the fishing rights he had reserved, see *Boyle* v. *Holcroft*, (1905) 1 Ir. 245; *Caldwell* v. *Kelkelly*, ib. p. 447.

(*r*) 39 & 40 Vict. c. 75. As to the scheme of the Act, and of the Explanatory Act, 1893, *infra*, see *Butterworth* v. *Yorkshire* (*W. R.*) *Rivers Board*, (1909) A. C. 45; 78 L. J. K. B. 203. See also the Rivers Pollution Prevention (Border Councils) Act, 1898, 61 & 62 Vict. c. 34.

person who puts, or knowingly permits to be put, into a stream (*s*), any solid refuse of a manufactory, or any putrid solid matter, so as to interfere with the due flow of the stream, or pollute its waters (*t*), or who causes or knowingly permits to flow (*u*) into any stream, any sewage matter (*x*), or who causes or knowingly permits to flow (*y*) into any stream any polluting liquid from a factory or manufacturing process (*z*), or who causes or knowingly permits to be carried into any stream any solid matter from a mine so as to prejudicially interfere with the due flow of the stream, or who causes or knowingly permits to flow into a stream any polluting solid or liquid matter from a mine (*a*), commits an offence against the Act. Provided that, where any sewage matter or polluting liquid from a factory or manufacturing process passes into a stream by a channel in use at the date of the Act, an offence is not committed if the person charged shows to the satisfaction of the Court that he is using the best practicable and reasonably available means to render the matter complained of harmless (*b*).

Notice of proceedings.

No proceedings can be taken under the Act for any offence against the Act until the expiration of two months after written notice of the intention to take such proceedings has been given, and proceedings are not to be taken for an offence against the Act while other proceedings in relation to such offence are pending (*c*), and in the case of offences under

(*s*) As to meaning of stream, see sect. 20, Rivers Pollution Act, 1876; *Yorkshire* (*W. R.*) *Rivers Board* v. *Preston*, (1905) 92 L. T. 25; and *Airdrie Magistrates* v. *Lanark County Council*, (1910) A. C. 286; 79 L. J. P. C. 82. See also as to streams into which sewage alone passes during part of the year, *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. 495; (1912) 81 L. J. Ch. 40.

(*t*) Section 2.

(*u*) See 56 & 57 Vict. c. 31, and *Kirkheaton Local Board* v. *Ainley*, (1892) 2 Q. B. 274; 61 L. J. Q. B. 812; *Yorkshire County Council* v. *Holmfirth Urban Sanitary Authority*, (1894) 2 Q. B. 842; 63 L. J. Q. B. 485; *Butterworth* v. *Yorkshire* (*W. R.*) *Rivers Board*, (1909) A. C. pp. 55, 56; 78 L. J. K. B. p. 203.

(*x*) Section 3.

(*y*) See *Butterworth* v. *Yorkshire* (*W. R.*) *Rivers Board*, (1909) A. C. 45; 78 L. J. K. B. 203.

(*z*) Section 4.

(*a*) Section 5.

(*b*) Sections 3 and 4, and see the similar proviso in sect. 5 as to drainage from mines.

(*c*) Section 13.

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sects. 4 and 5, proceedings can only be taken by a sanitary authority with the consent of the Local Government Board (*d*), which consent must be obtained before the two months' notice of proceedings prescribed by sect. 13 can be given (*e*).

Powers of Act cumulative.

The powers given by the Act do not, however, prejudice the exercise by an aggrieved person of any other rights or powers which he may have, provided that in any proceedings by such person for enforcing such rights or powers, the Court before which such proceedings are pending shall take into consideration any certificate granted to the defendant under sect. 12 of the Act that the best available means have been adopted by the defendant to render harmless the polluting matter (*f*). Nor does the Act apply to or affect the lawful exercise of any rights of impounding or diverting water (*g*).

Offences against Act restrained by summary order of County Court.

The jurisdiction of restraining offences against the Act is given to the County Court in the place where the offence is committed, which Court may by summary order require the offender to abstain from such offence, or, if the offence consists in default to perform a duty under the Act, may require him to perform such duty (*h*).

Order in effect an injunction.

This summary order of the County Court is in effect an injunction and in the discretion of the Court (*i*).

Pollution by others no answer to proceedings.

The fact that a river has been polluted by other persons is no excuse in proceedings under the Act to restrain a defendant committing an offence against the Act, and if the pollution by the defendant is appreciable, the plaintiff is *primâ*

(*d*) Section 6.

(*e*) *Yorkshire* (*W. R.*) *Rivers Board* v. *Robinson*, (1907) 1 K. B. 431; 76 L. J. K. B. 426.

(*f*) Section 16.

(*g*) Section 17. See *Ribble River Committee* v. *Halliwell*, (1899) 2 Q. B. 385; 68 L. J. Q. B. 984.

(*h*) Section 10. As to appeal and removal of case to High Court, see sect. 11 and *Yorkshire* (*W. R.*) *Rivers Board* v. *Ravensthorpe Urban Council*, (1907) 71 J. P. 209.

(*i*) *Kirkheaton Local Board* v. *Ainley*, (1892) 2 Q. B. pp. 282, 285; 61 L. J. Q. B. 812; *Re Derbyshire County Council* v. *Derby Corporation*, (1896) 2 Q. B. pp. 298, 299; 65 L. J. Q. B. p. 559; affirmed, (1897) A. C. 550; 66 L. J. Q. B. 701, sub. nom. *Derby Corporation* v. *Derbyshire County Council*; *Staffordshire County Council* v. *Scisdon Rural District Council*, (1907) 96 L. T. p. 331.

facie entitled to an order under sect. 10 (*k*). The county court in exercising its jurisdiction under sect. 10 therefore is not justified in refusing to make an order restraining acts which would cause an appreciable pollution if the stream were otherwise pure, merely because the pollution by other persons prevents the pollution by the defendant from being in the circumstances appreciable (*l*).

Injunction refused when summary order being complied with.

Where a summary order had been made in proceedings instituted by a county council against a local authority, requiring the defendants to abstain from polluting a river, and the defendants were carrying out works to comply with the order, the High Court in an action by a riparian owner, at whose instigation the county council had obtained the summary order, refused to grant him further relief by way of an injunction (*m*).

SECTION 5.—NUISANCES TO NAVIGABLE TIDAL WATERS.

Sect. 5.

Soil of seashore and bed of navigable tidal river.

The soil of the seashore (*n*), or bed of an estuary, or tidal navigable river, between the medium high and low water mark, is *primâ facie* vested in the Crown, and is a beneficial ownership, subject to the public rights of navigation and fishing in the superjacent waters (*o*).

(*k*) *Staffordshire County Council* v. *Seisdon Rural District Council*, (1907) 96 L. T. 328.

(*l*) Ib.

(*m*) *Harrington* (*Earl*) v. *Derby Corporation*, (1905) 1 Ch. pp. 205, 221; 74 L. J. Ch. 219.

(*n*) As to meaning of term "seashore," see *Att.-Gen.* v. *Chambers*, 4 De G. M. & G. 206; 23 L. J. Ch. 662; *Philpot* v. *Bath*, (1904) 20 T. L. R. 589; 21 T. L. R. 635; *Mellor* v. *Walmesley*, (1905) 2 Ch. p. 177; 73 L. J. Ch. 756. As to the bed and soil of the Thames, see Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), sects. 58, 72, 238; Port of London Act, 1908 (8 Edw. 7, c. 68), sect. 7. See also *Conservators of River Thames* v. *London Port Sanitary Authority*, (1894) 1 Q. B. 647; 63 L. J. M. C. 121; *Conservators of River Thames* v. *Smeed*, (1897) 2 Q. B. 334; 66 L. J. Q. B. 334.

(*o*) *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192, 207; 35 L. J. C. P. 29; *Foreman* v. *Free Fishers of Whitstable*, L. R. 4 H. L. p. 283; *Att.-Gen.* v. *Tomline*, 14 C. D. p. 69; 49 L. J. Ch. 377; *Att.-Gen.* v. *Emerson*, (1891) A. C. 649; 61 L. J. Q. B. 79; *Brinckman* v. *Matley*, (1904) 2 Ch. pp. 315, 316,

Purprestures.

Any invasion or encroachment on the soil of the sea-shore, or bed of an estuary or navigable tidal river, while the same is vested in the Crown is a purpresture (*p*). There is a wide difference between a purpresture and a nuisance. Although they may both co-exist, either may exist without the other. If the act complained of be a purpresture, it may be restrained at the suit of the Attorney-General, whether it be a nuisance or not. Being an encroachment on the soil of the Sovereign, like trespass on the soil of an individual, it will support an action irrespective of any damage which may accrue. But to constitute a public nuisance, damage to the public right of navigation or other public right must be shown to exist. If the act complained of be a mere purpresture without being at the same time a nuisance, the Court will usually direct an inquiry to be made whether it is more beneficial to the Crown to abate the purpresture or to suffer the obstruction to remain. But if the purpresture be also a public nuisance, this cannot be done, for the Crown cannot sanction a public nuisance (*q*). The Crown has no right to use its title to the soil so as to occasion a nuisance to its subjects, nor can it give any one a right to do so. Buildings or other erections which interfere with the public right of navigation over the water are nuisances at common law, whether made by the Crown or by a subject (*r*). The erection of a pier or embankment is not necessarily a nuisance. The true question in each case is, whether or not a damage accrues

Nuisance to public right of navigation.

325; 73 L. J. Ch. 642, 646; *Fitzhardinge* (*Lord*) v. *Purcell*, (1908) 2 Ch. p. 166; 77 L. J. Ch. pp. 529, 546; *Denaby and Cadeby Collieries Co.* v. *Anson*, (1911) 1 K. B. p. 206; 80 L. J. K. B. 320.

(*p*) *Att.-Gen.* v. *Chamberlaine*, 4 K. & J. 292; 116 R. R. 331.

(*q*) *Att.-Gen.* v. *Burridge*, 10 Price, 350; 24 R. R. 705; *Att.-Gen.* v. *Parmenter*, 10 Price, 412; 24 R. R. 723; *Att.-Gen.* v. *Johnson*, 2 Wils. Ch. 87; 18 R. R. 156; *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192, 208; 35 L. J. C. P. 29; *Att.-Gen.* v. *Lonsdale* (*Earl*), 7 Eq. 377, 389; 38 L. J. Ch. 335; *Att.-Gen.* v. *Terry*, 9 Ch. 423.

(*r*) Ib., and see *Att.-Gen.* v. *Tomline*, 14 C. D. p. 69; 49 L. J. Ch. 377; *Liverpool and North Wales Steamship Co.* v. *Mersey Trading Co.*, (1908) 2 Ch. 460; 77 L. J. Ch. 658; (1909) 1 Ch. 209; 78 L. J. Ch. 17; *Denaby and Cadeby Collieries Co.* v. *Anson*, (1911) 1 K. B. p. 208; 80 L. J. K. B. 320.

t ·:e navigation in the particular locality (*s*). If an erection be a hindrance to the navigation, it is no defence that the public inconvenience is counterbalanced by the benefit to be afforded by it (*t*).

Rights of riparian owner on banks of tidal navigable river.

A riparian owner on the banks of a tidal navigable river has the same rights or natural easements which belong to a riparian proprietor on the banks of a natural stream above the flow of the tide. In the part of the river where the tide flows and reflows, the soil between high water mark and low water mark and the soil in the bed of the river are *primâ facie* vested in the Crown, but the public are entitled to the rights of navigation and fishing, and to use the shore, the property of the Crown, for the purpose of embarking and disembarking, and for other purposes ancillary to their right of navigation and fishing (*u*). A riparian owner has the right of navigating the river as one of the public; but when the right of navigation is connected with an exclusive access to and from a particular wharf, it ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction (*x*).

(*s*) *Booth* v. *Ratté*, 15 A. C. 188; 59 L. J. P. C. 41; *Denaby and Cadeby Collieries Co.* v. *Anson*, (1911) 1 K. B. pp. 206, 207; 80 L. J. K. B. 320, and see *Liverpool and North Wales Steamship Co.* v. *Mersey Trading Co.*, (1908) 2 Ch. p. 473; 77 L. J. Ch. 658; (1909) 1 Ch. 209; 78 L. J. Ch. 17; and *Campbell's Trustees* v. *Sweeney*, (1911) S. C. 1319 (rafts moored in non-tidal public river).

(*t*) *Rex* v. *Ward*, 4 A. & E. 384; 5 L. J. (N. S.) K. B. 221; 43 R. R. 361; *Reg.* v. *Betts*, 16 Q. B. 1023; 19 L. J. Q. B. 531; *Att.-Gen.* v. *Terry*, 9 Ch. 423; and see *Denaby and Cadeby Collieries Co.* v. *Anson*, (1911) 1 K. B. p. 210; 80 L. J. K. B. p. 338; *Wednesbury Corporation* v. *Lodge Holes Colliery Co.*, (1907) 1 K. B. p. 91; 76 L. J. K. B. p. 74 (reversed on other grounds, (1908) A. C. 323; 77 L. J. K. B. 847); see *Campbell's Trustees* v. *Sweeney*, *supra*.

(*u*) *Hindson* v. *Ashby*, (1896) 2 Ch. p. 9; 65 L. J. Ch. p. 517; *Coppinger* v. *Sheehan*, (1906) 1 I. R. 519, 525.

(*x*) *Lyon* v. *Fishmongers Co.*, 1 A. C. 662; 46 L. J. Ch. 68. See *Bell* v. *Corporation of Quebec*, 5 A. C. 84; 49 L. J. P. C. 1; *North Shore*

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Navigation.

The public rights of user of the sea or navigable tidal waters for navigation, are more extensive than in the analogous case of a highway (*y*). The right of navigation includes the right of passage, and of anchoring, or otherwise securing in position the navigating vessel, and all rights ancillary to navigation. But the right claimed must be a right incidental to the navigation of the person claiming the right, and not a right incidental to the navigation of others. Thus a claim by a colliery company to moor a coal hulk in Portland Harbour for the purpose of supplying coal to vessels entering the port, was held bad in law, the sale of coal not being an act incidental to the company's own navigation (*z*).

Mooring.

A riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading at reasonable times and for a reasonable time and in a reasonable way; and the Court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his own premises, though such vessel would not be allowed to interfere with the proper right of access to the neighbouring premises, if used as a wharf, nor to the free entrance to or exit from such premises if used as a dock by other vessels (*a*). A right on the part of the owners of fishing boats and other craft to fix moorings in the foreshore of tidal navigable waters may, upon evidence of immemorial user, be supported either as an ordinary incident of the navigation of such waters, *or* on the presumption of a legal origin by grant from the Crown of the foreshore subject to such user, *or* by presumption of a concession by a former owner of the foreshore to all persons navigating the waters to use the foreshore for fixing moor-

Railway Co. v. *Pion*, 14 A. C. 612; 59 L. J. P. C. 25.

(*y*) *Simpson* v. *Att.-Gen.*, (1904) A. C. p. 509; 74 L. J. Ch. 1; *Denaby and Cadeby Collieries Co.* v. *Anson*, (1911) 1 K. B. pp. 198, 199; 80 L. J. K. B. p. 332; see *Campbell's Trustees* v. *Sweeney*, (1911) S. C. p. 1324.

(*z*) *Denaby and Cadeby Collieries Co.* v. *Anson* (1911) 1 K. B. 171; 80 L. J. K. B. 320.

(*a*) *Original Hartlepool Collieries Co.* v. *Gibb*, 5 C. D. 713; 46 L. J. Ch. 311; *Land Securities Co.* v. *Commercial Gas Co.*, (1902) 18 T. L. R. 405. As to mooring in navigable non-tidal waters, see *Campbell's Trustees* v. *Sweeney*, (1911) S. C. 1319.

ings. It seems that such a right might also, in the case of the river Thames, have been supported on presumption of regulations of the port authority of the port of London (*b*).

Fishing.

The right to fish in the sea between high and low water mark, and in tidal (*c*) rivers, is *primâ facie* vested in the public (*d*), but in the case of non-tidal rivers or lakes, even though they be navigable, the public have no such right (*e*). Persons using a navigable non-tidal river no more acquire thereby a right to fish therein than persons passing along a public highway on land acquire a right to shoot upon it (*f*).

Fouling navigable tidal rivers.

The same principles apply with respect to nuisances arising from the discharge into navigable tidal rivers of matters injurious to health as are applicable in the case of ordinary rivers (*g*).

Discharge of sewage into sea.

There is no right at common law to discharge sewage into the sea so as to commit a nuisance (*h*). The right of drainage into the sea and navigable tidal rivers, conferred by the Towns Improvement Clauses Act, 1847, is subject to the condition that no nuisance be created (*i*).

(*b*) *Att.-Gen.* v. *Wright*, (1897) 2 Q. B. 318; 66 L. J. Q. B. 834. As to meaning of "mooring," see *Liverpool and North Wales Steamship Co.* v. *Mersey Trading Co.*, (1908) 2 Ch. p. 474; 77 L. J. Ch. 678, and as to "navigable," *Reece* v. *Miller*, 8 Q. B. D. 626; 51 L. J. M. C. 64; *Rochester (Earl)* v. *Raisleigh*, 61 L. T. 478.

(*c*) As to "tidal," see *Reece* v. *Miller, supra*; *Yorkshire (West Riding) Rivers Board* v. *Tadcastle Rural Council*, (1907) 97 L. T. 436; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 401; 80 L. J. Ch. p. 149.

(*d*) *Neill* v. *Duke of Devonshire*, 8 A. C. p. 177; *Reece* v. *Miller*, 8 Q. B. D. p. 629; 51 L. J. M. C. 64.

(*e*) *Pearce* v. *Scotcher*, 9 Q. B. D. 162; 46 L. T. 342; *Smith* v. *Andrews*, (1891) 2 Ch. 678; 65 L. T. 175; *Hudson* v. *Ashby*, (1896) 2 Ch. p. 9; 65 L. J. Ch. p. 517; *Johnston* v. *O'Neill*, (1911) A. C. p. 577; 81 L. J. P. C. p. 31. See as to the Norfolk broads, *Mickle-thwait* v. *Vincent*, 67 L. T. 225; *Blower* v. *Ellis*, 50 J. P. 326.

(*f*) *Smith* v. *Andrews*, (1891) 2 Ch. pp. 695, 696; 65 L. T. 75.

(*g*) *Att.-Gen.* v. *Kingston-on-Thames Corporation*, 34 L. J. Ch. 481.

(*h*) *Foster* v. *Warblington Urban Council*, (1906) 1 K. B. pp. 665, 678; 75 L. J. K. B. 514; *Hobart* v. *Southend-on-Sea Corporation*, (1906) 75 L. J. K. B. 305 (compromised on appeal on other grounds, 22 T. L. R. 536); [illegible] v. *Faversham Corporation*, (1909) 73 J. P. 33.

(*i*) See 10 & 11 Vict. c. 34, sect. 24 and *Att.-Gen.* v. *Kingston-on-Thames Corporation*, *supra*, and *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. 526; 78 L. J. Ch. 1.

Nuisance to fishery restrained without deciding ownership of the soil.

Where a local authority discharged sewage into the sea and rendered the plaintiff's oyster ponds unfit for use, the plaintiff as occupier of the ponds was held entitled apart from proof of any title to the soil or to a several fishery, to maintain an action for the trespass (*k*). So, also, where a defendant had, by erecting an embankment and enclosing the bed of a tidal river, shut out and prevented the tide from reaching a mussel-bed and breeding-ground, the Court granted an injunction without deciding or entering upon the question as to the ownership of the soil (*l*).

Commissioners of sewers.

By various Acts, the Commissioners of Sewers have been invested with the power of determining where, and to what extent, public convenience will justify an obstruction to any arm or inlet of the sea or navigable river, and of otherwise controlling and regulating them as the exigencies of the public will require (*m*). Acting *bonâ fide* for the benefit of the levels, the Commissioners of Sewers may erect defences against the inroads of the sea, although they may thereby cause the sea to flow with greater violence against the adjoining land (*n*).

Sea-walls.

The owner of the land on the seashore is not bound at common law, apart from prescription, to keep in repair a sea-wall; nor is the mere fact that each frontager had always maintained the sea-wall in front of his land, and that no one had thought it necessary to erect a wall to protect his land from the water which might come from h neighbour's land, sufficient evidence to establish a prescriptive liability on the

(*k*) *Foster* v. *Warblington Urban Council*, (1906) 1 K. B. 649; 75 L. J. K. B. 514.

(*l*) *Bridges* v. *Highton*, 11 L. T. (N. S.) 653. As to liability of Conservators of the river Medway for injury to oyster beds by wreck, see *The Bien*, (1911) P. 40; 80 L. J. P. 59. Fishing for salmon by means of drift nets is illegal in Scotland, *Wedderburn* v. *Duke of Atholl*, (1900) A. C. 403 (Sc.); 16 T. L. R. 413, but not in Ireland, *Irish Society* v. *Harold*, (1912) A. C. 287; 81 L. J. P. C. 162.

(*m*) See 23 Hen. 8, c. 5; 3 & 4 Will. 4, c. 22; 24 & 25 Vict. c. 133.

(*n*) *Rex* v. *Commissioners of Sewers for Pagham*, 8 B. & C. 355; *Att.-Gen.* v. *Earl Lonsdale*, L. R. 7 Eq. p. 387; 38 L. J. Ch. 335. See *Maxey Drainage Board* v. *Great Northern Railway Co.*, (1912) 106 L. T. 129; 56 S. J. 275.

part of a frontager to maintain the wall for the protection of the adjoining landowners (*o*).

Foreshore *primâ facie* property of Crown.

The Crown is *primâ facie* entitled to every part of the foreshore (*p*), that is the land which lies between high and low water mark of ordinary tides (*q*).

Right of public.

The public have the right to pass over the foreshore when covered by the tide for the purposes of navigation and fishing (*r*). The right of navigation includes the right of access to the sea (*s*), and of anchoring and doing other acts incidental to the navigation of the person claiming the right (*t*). When the foreshore is uncovered by the tide, there is no common law right in the public to pass over it except for the purposes of navigation or fishing (*u*). Accordingly the public have no right to use the

(*o*) *Hudson* v. *Tabor*, 2 Q. B. D. 290; 46 L. J. Q. B. 463; *Att.-Gen.* v. *Tomline*, 14 C. D. p. 65; 49 L. J. Ch. 377; *Commissioners of Sewers for Essex* v. *Rey.*, 11 A. C. 449; 56 L. J. M. C. 1; *Rundle* v. *Hearle*, (1898) 2 Q. B. p. 90; 67 L. J. Q. B. p. 744; and see *London and North Western Railway Co.* v. *Commissioners of Sewers for Fobbing Levels*, 66 L. J. Q. B. 127.

(*p*) *Att.-Gen.* v. *Emmerson*, (1891) A. C. 649; 61 L. J. Q. B. 79; *Mellor* v. *Walmesley*, (1905) 2 Ch. p. 177; (1904) 73 L. J. Ch. 758; *Fitzhardinge* (*Lord*) v. *Purcell*, (1908) 2 Ch. p. 167; 77 L. J. Ch. 529. The ownership of the foreshore may be vested in a subject by grant or prescription, *Denaby and Cadeby Collieries Co.* v. *Anson*, (1911) 1 K. B. p. 177; 80 L. J. K. B. 320. As to the ownership of a several fishery raising a presumption that the soil is in the grantee of the fishery, see *Att.-Gen.* v. *Emmerson*, *supra*; *Beaufort* (*Duke*) v. *Aird*, (1904) 20 T. L. R. 602; *Tracey-Elliott* v. *Earl Morley*, (1907) 51 S. J. 625.

(*q*) *Mellor* v. *Walmesley*, *supra*; *Fitzhardinge* (*Lord*) v. *Purcell*, (1908) 2 Ch. p. 165; 77 L. J. Ch. 529.

(*r*) *Blundell* v. *Catterall*, 5 B. & Ald. pp. 268, 301; 24 R. R. 353; *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192; 35 L. J. C. P. 29; *Brinckman* v. *Matley*, (1904) 2 Ch. pp. 315, 316; 73 L. J. Ch. 642 and see *Fitzhardinge* (*Lord*) v. *Purcell*, (1908) 2 Ch. 139; 77 L. J. Ch. 529; *Denaby and Cadeby Collieries Co.* v. *Anson*, (1911) 1 K. B. pp. 198, 208; 80 L. J. K. B. p. 332. As to the management of the foreshore, see 6 Edw. 7, c. 28, sects. 2 & 3.

(*s*) *Att.-Gen.* v. *Wemyss*, 13 A. C. 192; 57 L. J. P. C. 62; *Brinckman* v. *Matley*, *supra*; *Mellor* v. *Walmesley*, (1905) 2 Ch. p. 180; 73 L. J. Ch. 758; *Coppinger* v. *Sheeham*, (1906) 1 Ir. 519; *Fitzhardhinge* (*Lord*) v. *Purcell*, (1908) 2 Ch. p. 166; 77 L. J. Ch. 529.

(*t*) *Denaby and Cadeby Collieries Co.* v. *Anson*, (1911) 1 K. B. p. 211; 80 L. J. K. B. p. 330. As to mooring in a non-tidal river, see *Campbell's Trustees* v. *Sweeney*, (1911) S. C. 1319.

(*u*) *Llandudno Urban Council* v. *Woods*, (1899) 2 Ch. 709; 68 L. J.

shore for the purposes of bathing or amusement (*x*), or meetings (*y*), or to place chairs for hire thereon (*z*), or to shoot wild fowl thereon (*a*), or to appropriate any part thereof for the storage of oysters to the exclusion of the public (*b*), or to remove sand or shingle therefrom (*c*).

Protection of foreshore and harbours.

It is the duty of the Crown to protect the realm from the inroads of the sea by maintaining the natural barriers or by raising artificial barriers, and therefore, no subject is entitled to destroy a natural barrier against the sea; and if the destruction of such natural barrier would cause an injury to a neighbouring landowner, he is entitled to an injunction to restrain it (*d*). In an action accordingly by the Attorney-General suing on behalf of the Crown, as owner of a piece of land adjoining the foreshore, an injunction was granted to restrain the defendant, the owner of the foreshore, from removing shingle therefrom so as to expose the land of the plaintiff to the inroads of the sea, although the shingle was removed for sale in a natural and ordinary user of the land (*e*).

In order to prevent damage being done to the shores of ports, harbours, or havens, the Board of Trade has power by Act (*f*) to prohibit the removal therefrom of shingle by any person, provided that nothing in the Act shall take away any right of property possessed by any corporate body or person in any ports, harbours, or havens, or in the shores thereof (*g*).

Ch. 623; *Brinckman* v. *Matley*, (1904) 2 Ch. p. 313; 73 L. J. Ch. 642; *Behrens* v. *Richards*, (1905) 2 Ch. p. 622; 74 L. J. Ch. p. 619; *Fitzhardinge* (*Lord*) v. *Purcell*, (1908) 2 Ch. pp. 166, 168; 77 L. J. Ch. p. 545.

(*x*) *Llandudno Urban Council* v. *Woods*, *Brinckman* v. *Matley*, *supra*.

(*y*) *Llandudno Urban Council* v. *Woods*, *supra*; *Brighton Corporation* v. *Packham*, (1908) 24 T. L. R. 603; 72 J. P. 318.

(*z*) *Ramsgate Corporation* v. *Debling*, (1906) 22 T. L. R. 369; 70 J. P 132.

(*a*) *Fitzhardinge* (*Lord*) v. *Purcell*, (1908) 2 Ch. 139; 77 L. J. Ch. 529.

(*b*) *Truro Corporation* v. *Rowe*, (1902) 2 K. B. 709; 71 L. J. K. B. 974; *Foster* v. *Warblington Urban Council*, (1906) 1 K. B. p. 666; 75 L. J. K. B. 514.

(*c*) *Brinckman* v. *Matley*, *supra*, and see *infra*, notes (*f*), (*g*).

(*d*) *Att.-Gen.* v. *Tomline*, 14 C. D. 58; 49 L. J. Ch. 377.

(*e*) Ib. See *Laird* v. *Briggs*, 19 C. D. 22; 45 L. T. 238.

(*f*) Harbours Act, 1814 (54 Geo. III. c. 159), sect. 14, amended by Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), s. 16.

(*g*) 25 & 26 Vict. c. 69, s. 41

SECTION 6.—NUISANCES TO RIGHTS OF WAY.

ANOTHER class of cases in which the interference of the Court by injunction may be sought are nuisances to rights of way.

Modes of acquiring the right.

A private right of way may arise by grant, express or implied (*h*), or by prescription at common law, or under the Prescription Act (*i*), or by virtue of an inclosure Act (*k*).

Grant.

If a right of way is appurtenant or annexed to land, it passes by a grant of the land to which it is appurtenant without any special words of conveyance (*l*). But if a way is not appurtenant to land, it will not pass by general words of conveyance, unless there be something in the deed or in the general circumstances of the case to show that the parties intended the words in a way other than their strict sense (*m*), or unless the right is necessary for the beneficial enjoyment of the premises for the purposes for which, according to the obvious intention of the parties, the grant was made (*n*).

See *Anderson* v. *Jacobs*, (1905) 93 L. T. 17; 21 T. L. R. 453; *Musselburgh Real Estate Co.* v. *Musselburgh Corporation*, (1905) A. C. 491; *Burton* v. *Hudson*, (1909) 2 K. B. 564; 78 L. J. K. B. 905; *Lake* v. *Smith*, (1912) 106 L. T. 41.

(*h*) See *Dodd* v. *Burchell*, 31 L. J. Ex. 364, 368; *Miller* v. *Hancock*, (1893) 2 Q. B. p. 180; 69 L. T. p. 215; *Donnelly* v. *Adams*, (1905) 1 Ir. 154; *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, (1907) 1 Ch. 208; 75 L. J. Ch. 807; *Rudd* v. *Bowles*, (1912) 2 Ch. 60; 81 L. J. Ch. 277. As to the reservation of an easement operating as a regrant by the grantee to the grantor, see *Durham and Sunderland Railway Co.* v. *Walker*, 2 Q. B. p. 967; 11 L. J. Ex. p. 446; *May* v. *Belleville*, (1905) 2 Ch. 605; 74 L. J. Ch. 678. As to presuming a lost grant, see *Roberts* v. *James*, (1903) 89 L. T. 282, and *Hulbert* v. *Dale*, (1909) 2 Ch. 570; 78 L. J. Ch. 457.

(*i*) 2 & 3 Will. 4, c. 71, sects. 2 and 4, and see *Hulbert* v. *Dale*, (1909) 2 Ch. pp. 576, 577; 78 L. J. Ch. 457.

(*k*) See *Hulbert* v. *Dale*, *supra*.

(*l*) *Skull* v. *Glenister*, 16 C. B. N. S. 81; 33 L. J. C. P. 185. See *Watts* v. *Kelson*, 6 Ch. p. 173; 40 L. J. Ch. 126; *Thorpe* v. *Brumfitt*, 8 Ch. 650; *Kay* v. *Oxley*, L. R. 10 Q. B. p. 365; 44 L. J. Q. B. 210; and see C. A. 1881, s. 6.

(*m*) *James* v. *Plant*, 4 A. & E. p. 761; 6 L. J. (N. S.) Ex. 260; 43 R. R. 465; *Worthington* v. *Gimson*, 2 El. & El. 618; 29 L. J. Q. B. 116; 119 R. R. 873; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; 44 L. J. Q. B. 210; *Brett* v. *Clowser*, 5 C. P. D. p. 382.

(*n*) *Kavanagh* v. *Coal Mining Co.*, 14 Ir. C. L. 82; *Thomson* v. *Waterlow*, 6 Eq. 36; 37 L. J. Ch. 495; *Bayley* v. *Great Western Railway Co.*, 26 C. D. p. 453. See *Watts* v. *Kelson*, 6 Ch. 166; 40 L. J.

General words such as "appurtenants," "appertaining to," "belonging to," &c., are not sufficient to pass the right (*o*), nor would a mere reference in the deed to an intended way be sufficient to pass the way (*p*), but a conveyance of lands with "ways heretofore," or "therewith used or enjoyed," expressly mentioned (*q*), or deemed to be included by virtue of sect. 6 (2) of the Conveyancing Act, 1881 (*r*), is as a general rule sufficient. Where there are two adjoining closes and there exists over one of them a formed and constructed road which is in fact used for the purpose of the other, and that other is granted with the general words "together with all ways now used or enjoyed therewith," a right of way over the formed road will pass to the grantee even though that road has been constructed during the unity of possession of the two closes and has not existed previously (*s*). But if the way is not a defined road but is merely a way which has been used by the owner of two closes for his own convenience during unity of possession, it will not upon a severance taking place pass even under the words "used or enjoyed" (*t*). The mere

Ch. 126; *Donnelly* v. *Adams*, (1905) 1 Ir. 154; *Browne* v. *Flower*, (1911) 1 Ch. p. 225; 80 L. J. Ch. p. 184.

(*o*) *Plant* v. *James*, 5 B. & A. p. 794; *Pheysey* v. *Vicary*, 16 M. & W. p. 496; 73 R. R. 583; *Bolton* v. *Bolton*, 11 C. D. p. 971; 48 L. J. Ch. 467; *Baring* v. *Abingdon*, (1892) 2 Ch. p. 390; 62 L. J. Ch. pp. 112, 113; see *Re Peck and the London School Board*, (1893) 2 Ch. p. 320; 62 L. J. Ch. 598.

(*p*) *Harding* v. *Wilson*, 2 B. & C. 96; 1 L. J. K. B. 238; 26 R. R. 287; *Bolton* v. *Bolton*, 11 C. D. p. 971; 48 L. J. Ch. 467.

(*q*) *Plant* v. *James*, 5 B. & A. p. 794; *Worthington* v. *Gimson*, 2 El. & El. 624; 29 L. J. Q. B. 116; 119 R. R. 873; *Kay* v. *Oxley*, L. R. 10 Q. B. p. 367; 44 L. J. Q. B. 210; *May* v. *Belleville*, (1905) 2 Ch. pp. 605, 613; 74 L. J. Ch. 678.

(*r*) *International Tea Stores* v. *Hobbs*, (1903) 2 Ch. 165; 72 L. J. Ch. 543; see *Lewis* v. *Meredith*, (1913) 1 Ch. 579; 82 L. J. Ch. 255 (watercourse).

(*s*) *Barkshire* v. *Grubb*, 18 C. D. p. 620; 50 L. J. Ch. 731; *Bayley* v. *Great Western Railway Co.*, 26 C. D. p. 457; 51 L. T. 337; *Baring* v. *Abingdon*, (1892) 2 Ch. p. 390; 62 L. J. Ch. 105; *Nicholls* v. *N.*, (1900) W. N. p. 4; 81 L. T. 811. See *International Tea Stores Co.* v. *Hobbs*, (1903) 2 Ch. 165; 72 L. J. Ch. 543; *May* v. *Belleville*, (1905) 2 Ch. p. 613; 74 L. J. Ch. 678.

(*t*) *Langley* v. *Hammond*, L. R. 3 Exch. 161; 37 L. J. Ex. 118; *Kay* v. *Oxley*, L. R. 10 Q. B. 361; 44 L. J. Q. B. 210; *Brett* v. *Clowser*, 5 C. P. D. 382; see *Re Peck and the London School Board*, (1893) 2 Ch. 315; 62 L. J. Ch. 598.

fact however that the way did not exist as a right of way before unity of possession, will not prevent the Court from holding that a new right of way as appurtenant to the use of the premises is created (*u*).

Although the mere grant of "all appurtenances," or of all ways appurtenant to the prineipal subject of the grant has been held in many cases not to create a new right of way where the right was not pre-existing at the date of the grant, the word "appurtenances," may in the circumstances of the case, admit of a secondary meaning and be equivalent to rights "usually employed" with the land conveyed (*x*).

It is upon the prineiple that upon the grant of a thing everything is impliedly granted which is necessary to enable the grantee to enjoy the subject of a grant, that a way of neeessity passes with land when granted (*y*). The same prineiple which applies to the use of conveyanees also applies to cases where a severance of a heritage takes place by will (*z*). One devisee, if necessary, may pass over land devised to another, in order to gain access to land which has been devised to himself (*a*).

Conveyancing Act, 1881, s. 6.

Sect. 6 of the Conveyancing Act, 1881, under which general words are implied in conveyances of land, applies only to conveyances and does not affect contracts (*b*).

(*u*) *Bayley* v. *Great Western Railway Co.*, 26 C. D. p. 455; 51 L. T. 337. See *Brown* v. *Alabaster*, 37 C. D. 490; 57 L. J. Ch. 255; *Nicholls* v. *N.*, W. N. (1900) p. 4 81 L. T. 811; *Browne* v. *Flower*, (1911) 1 Ch. p. 225; 80 L. J. Ch. p. 184.

(*r*) *Thomas* v. *Owen*, 20 Q. B. D. 225; 57 L. J. Q. B. 198; *Nicholls* v. *N.*, (1900) W. N. p. 4; 81 L. T. 811.

(*y*) *Staple* v. *Heydon*, 6 Mod. 1; *Pearson* v. *Spencer*, 1 B. & S. 584; 124 R. R. 656; *Bayley* v. *Great Western Railway Co.*, 26 C. D. pp. 452. 453; 51 L. T. 337; *Miller* v. *Hancock*, (1893) 2 Q. B. p. 180; 69 L. T. p. 215; *Donnelly* v. *Adams* (1905) 1 Ir. 151; *Browne* v. *Flower*, (1911) 1 Ch. p. 225; 80 L. J. Ch. p. 184.

(*z*) *Pheysey* v. *Vicary*, 16 M. & W. 484; 73 R. R. 583; *Polden* v. *Bastard*, L. R. 1 Q. B. 156; 35 L. J. Q. B. 92; *Phillips* v. *Low*, (1892) 1 Ch. 47; 61 L. J. Ch. 44; *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, (1907) 1 Ch. p. 219; 75 L. J. Ch. 807.

(*a*) *Pearson* v. *Spencer*, 1 B. & S. 584; 3 B. & S. 760; 124 R. R. 656, 667; *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, *supra*.

(*b*) *Re Peck and the London School Board*, (1893) 2 Ch. 315; 62 L. J. Ch. 598; *Re Hughes and Ashley*,

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Accordingly, under a contract for sale of land "with the appurtenances," the purchaser is only entitled to have such general words inserted in the conveyance as he would have been entitled to before the Conveyancing Act, 1881, came into operation; and if the general words implied by sect. 6 are more extensive than the contract the vendor is entitled to have them limited accordingly (*b*).

Limits of right when acquired by grant.

If a right of way be acquired by grant, the extent of the easement must be determined by the words of the grant (*c*). In construing the terms of a grant and its meaning with respect to the nature and extent of the easements that pass with it, reference is to be had to the existing state of things at the time of the grant (*d*), and what must be imputed to the parties as their intention at the time of the deed will be regarded (*e*). As a general rule, the grant of a right of way imports the grant of such a way as is reasonably necessary for the purposes for which it was granted. The grantee may use the way in such a manner as is necessary for its most commodious enjoyment (*f*). The grantee is not however necessarily entitled to the use of every part of the surface of the

(1900) 2 Ch. 595; 69 L. J. Ch. 741.

(*b*) See note (*b*), *ante*.

(*c*) *Williams* v. *James*, L. R. 2 C. P. 581; 36 L. J. C. P. 256; *Watts* v. *Kelson*, 6 Ch. 166; 40 L. J. Ch. 126; *United Land Co.* v. *Great Eastern Railway Co.*, 10 Ch. 586; 44 L. J. Ch. 685; *Cannon* v. *Villars*, 8 C. D. 420; 47 L. J. Ch. 597; *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, (1907) 1 Ch. p. 220; 75 L. J. Ch. 807; *White* v. *Grand Hotel, Eastbourne*, (1913) 1 Ch. p. 116; 82 L. J. Ch. 57.

(*d*) *Henning* v. *Burnett*, 8 Ex. 187; 22 L. J. Ex. 79; *Pearson* v. *Spencer*, 1 B. & S. 585; 124 R. R. 656; *Wood* v. *Saunders*, 10 Ch. 582; *Cannon* v. *Villars*, 8 C. D. 420; 47 L. J. Ch. 597; *Bayley* v. *Great Western Railway Co.*, 26 C. D. 453; 51 L. T. 537; *Great Northern Railway Co.* v. *M'Alister*, (1897) 1 Ir. 587; *Great Western Railway Co.* v. *Talbot*, (1902) 2 Ch. 759; 71 L. J. Ch. 835; *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, (1907) 1 Ch. 208; 75 L. J. Ch. 807; *Thornton* v. *Little*, (1907) 97 L. T. 24; W. N. 68, and see *Taff Vale Railway Co.* v. *Gordon-Canning*, (1909) 2 Ch. p. 53; 78 L. J. Ch. 492.

(*e*) *Collins* v. *Slade*, 23 W. R. 200; W. N. (1874) 205; *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, (1907) 1 Ch. p. 227; 75 L. J. Ch. 807.

(*f*) *Seuhouse* v. *Christian*, 1 T. R. 560; 1 R. R. 369; *Cannon* v. *Villars*, 8 C. D. 420; 47 L. J. Ch. 597; *Clifford* v. *Hoare*, L. R. 9

way (*g*). Where there was a grant of a way with liberty to make and lay causeways, and to use and enjoy the same with carts, waggons, and other carriages, and to carry coals, it was held that the grantee had a right to lay a framed waggon way (*h*). So also where a grant was made of a piece of land, as a foot or causeway, with other liberties, powers, and authorities incident to or appurtenant, needful or necessary to the use, occupation, or enjoyment of the said road, way or passage, it was held that the grantee had a right to put a piece of flagstone upon a part of the land in front of a door opened by him from his house (*i*). So also the grant of a wayleave to a coal mine comprises such a wayleave as will be reasonably sufficient to enable the grantee to get all the seams of coal at a reasonable profit. The right is not confined to such ways as were in use at the time of the grant. A railway may, it would appear, be laid down for the purpose (*k*). In a case where lessees were authorised to take and use full and sufficient rail or other ways, paths and passages to carry all or any of the coal, iron and ironstone, the produce of the mines demised or any other mines, it was held that they might lay down a railway for the carriage of coal raised by them from the pits of adjoining collieries worked by them, and that they were not restricted to using the railway for the carriage of coals raised by or through the pits of the mines demised to them by the lease (*l*). The right, however, is limited to such ways as are reasonably necessary or proper for enabling the grantee to get at the things conveyed, and does not extend generally to making roads for other purposes (*m*). But if a right of way is granted over land in general terms, the grantee is not limited

C. P. p. 371; 43 L. J. C. P. 225; *Strick* v. *City Offices Co.*, (1906) 22 T. L. R. 667; *Milner's Safe Co.* v. *Great Northern Railway Co.*, (1907) 1 Ch. p. 222; 75 L. J. Ch. 807.

(*g*) *Strick* v. *City Offices Co.*, *supra*.

(*h*) *Senhouse* v. *Christian*, 1 T. R. 560; 1 R. R. 300.

(*i*) *Gerard* v. *Cooke*, 2 B. & P. N. R. 109.

(*k*) *Dand* v. *Kingscote*, 6 M. & W. 174; 9 L. J. (N. S.) Ex. 270; 55 R. R. 560; *Proud* v. *Bates*, 34 L. J. Ch. 407; *Newcomen* v. *Coulson*, 5 C. D. pp. 139, 145.

(*l*) *Bilder* v. *North Staffordshire Railway Co.*, 4 Q. B. D. p. 429; 48 L. J. Q. B. 248.

(*m*) *Durham and Sunderland Railway Co.* v. *Walker*, 2 Q. B. 940; 57

to a right of way for agricultural purposes. If houses are built upon the land, the grantee has a right of way for all reasonable purposes to all the houses which may be built on the land (*n*). So also where a private right of way was created by an inclosure award, to a particular place, to the unrestricted use of which the grantee of the right of way was entitled, the grant was held not to be restricted to access to the land for purposes for which access was required at the time of the grant (*o*). And where a level crossing was constructed by a railway company under sect. 68 of the Railways Clauses Consolidation Act, 1845, to connect agricultural land which had been severed by their line, the landowner's user of the crossing was held not to be restricted to agricultural purposes, but user of the crossing by the landowner's tenants and their licensees, as a means of access to a tennis club which had been established on part of the land, so as to substantially increase the burden on the servient tenement, was held a lawful user (*p*).

Where a right of way is granted to "the owner . . . owner for the time being" of lands, and the lands are subsequently severed, the grant gives a right of way to the owner, for the time being, of every part of the severed lands. If the land is parcelled out into allotments, every allottee would have a right of way (*q*). The grantee of a right of way has a right of way to enter upon the land of the grantor over which the way extends, for the purpose of making the grant effective, *i.e.*, so as to enable him to exercise the right granted to him. If a man grants another a [illegible] way over his land to his house, the grantee has [illegible] and may make a carriageway over such part [illegible] sufficient

R. R. 842. See *Farrow* v. [illegible] *tart*, 1 Ra. Ca. 602; comp. *Bost* v. *Sidebott*[illegible], 18 Q. B. 833.

(*n*) *Newcomen* v. *Coulson*, 5 Ch. D. 133; 46 L. J. Ch. 459. See *Sou* v. *Great Western Railway Co.* [illegible] L. T. 881; *White* v. *Grand Hotel, Eastbourne* (1913) 1 Ch. 113; 82 L. J. Ch. 7.

(*o*) *Ha* v. *Great Western Ra* [illegible] 1904) W[illegible] 74 L. Ch. p. 13[illegible]

(*p*) *Ta* [illegible] *ng* *Gordon-Cum* [illegible] 1906] 1 Ch. [illegible] 1 J. Ch. [illegible]

(*q*) *Newc* [illegible] v. *Coulson*, 5 C. D. 133; 46 L. J. Ch. 459.

cient to support a carriage and horses and the ordinary traffic of a carriage way (*r*).

Repair of way.

As the grant of an easement is *primâ facie* the grant of all ancillary rights as are reasonably necessary for its enjoyment, the grantee of a right of way has the right to repair the way from time to time, but the grantor is not, apart from express contract or by necessary implication, bound to execute any repairs to ensure the enjoyment of the easement by the grantee (*s*).

Persons entitled to use a right of way.

A grant of a right of way to a house *primâ facie* extends to the grantee's family, his servants, visitors and [illegible] people, although not expressly named (*t*), and a grant of a right of way to a grantee and other tenants, "visitors with or without carriages" was held to extend to the grantee's pupils, the effect being that, at the date of the grant, the [illegible] carrying on a school upon the premises (*u*).

Thus the right to use an adjoining garden in a grant of a house to a purchaser, his heirs and assigns, his and their lessees, sub-lessees or tenants, and guests and their families and friends, was held not to extend to the members of a club which had been formed by a company which had purchased the house for use as a residential home and club by the members thereof (*x*).

Right cannot be used beyond the terms of the grant.

If a right of way be granted in express terms for a definite purpose, the grantee may not use the way beyond the terms of his grant. If a man has a right of way to one close of land, he may not use the way for the purpose of going to another close beyond it (*y*). Nor can a right of way granted

(*r*) Ib.

(*s*) *Newcomen* v. *Coulson*, 5 C. D. p. 133; 46 L. J. Ch. 459; *Miller* v. *Hancock*, (1893) 2 Q. B. p. 181; 69 L. T. p. 215; *Huggett* v. *Miers*, (1908) 2 K. B. p. 287; 77 L. J. K. B. p. 713; *Jones* v. *Pritchard*, (1908) 1 Ch. pp. 637, 638; 77 L. J. Ch. p. 409.

(*t*) *Barendale* v. *North Lambeth Liberal and Radical Club*, (1902) 2 Ch. p. 429; 71 L. J. Ch. 806.

(*u*) *Thornton* v. *Little*, (1907) 97 L. T. 24; W. N. 68.

(*x*) *Keith* v. *Twentieth Century Club*, (1906) 73 L. J. Ch. 545; 90 L. T. 775.

(*y*) *Senhouse* v. *Christian*, 1 T. R. 560; 1 R. R. 309; *Bowser* v. *Maclean*, 2 De G. F. & J. 415; 30 L. J. Ch. 273; *Williams* v. *James*, L. R. 2 C. P. 577; 36 L. J. C. P. 256; *Harris* v. *Flower & Co.*, (1904) W. N. 180; (1905) 74 L. J. Ch. p. 130.

for a carriage road to a dwelling-house be used for the purpose of driving cattle to a field (*z*). So also if a way be granted to a particular corner of a field, the grantee may not use it to enter his field at any other point (*a*), nor would the grantee of a way be justified in making transverse roads across the land (*b*). So also the grant of a way for agricultural purposes is not a general right of way, but is one of a limited character. It does not include the right to transport coals (*c*), or lime from a quarry (*d*); so also the grant of a right of way to a field is a way for any purpose for which the field may be used, so long as it continues a field or an open space or is generally in the same predicament in which it was at the time of the grant, but it does not extend to a right of way to houses which may be afterwards erected on it (*e*). So also an implied grant of a right of way over a passage to a dwelling-house and manufactory for domestic and ordinary business purposes, was held not to extend to a right of way for passengers to and from a station which had been erected by a railway company in the place of the house and manufactory (*f*).

If the grant of the way be not for a definite purpose, but be in general terms, the right of way may be used for whatever purposes the land is used, unless otherwise limited by the context (*g*).

But the grantee of a way is not necessarily limited to the

(*z*) *Brunton* v. *Hall*, 1 Q. B. 792; 10 L. J. Q. B. 258; *Henning* v. *Burnett*, 8 Ex. 187; 22 L. J. Ex. 79.

(*a*) *Henning* v. *Burnett*, ib.

(*b*) *Senhouse* v. *Christian*, 1 T. R. 560; 1 R. R. 300.

(*c*) *Cowling* v. *Higginson*, 4 M. & W. 245; 7 L. J. Ex. 265.

(*d*) *Jackson* v. *Stacey*, Holt, N. P. 455; 17 R. R. 663.

(*e*) *Allan* v. *Gomme*, 11 A. & E. 759, 772; 9 L. J. Q. B. 258; *Henning* v. *Burnett*, *supra*; *South Metropolitan Cemetery Co.* v. *Eden*, 16 C. B. 51; 100 R. R. 608; *Williams* v. *James*, L. R. 2 C. P. p. 582; 36 L. J. C. P. p. 529; *Collins* v. *Slade*, 23 W. R. 200; (1874) W. N. 205; *Wimbledon Conservators* v. *Dixon*, 1 C. D. p. 368.

(*f*) *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, (1907) 1 Ch. 208; 75 L. J. Ch. 807; compromised in C. A., (1907) 1 Ch. 229; 76 L. J. Ch. 99.

(*g*) *South Metropolitan Cemetery Co.* v. *Eden*, *supra*; *United Land Co.* v. *Great Eastern Railway Co.*, 10 Ch. p. 590; 44 L. J. Ch. 685; *Somerset* v. *Great Western Railway Co.*, 46 L. T. 884; *White* v. *Grand Hotel, Eastbourne*, (1913) 1 Ch. 113; 82 L. J. Ch. 57 (house turned into hotel).

use of the way, so long as the place to which it leads continues in the same predicament as it was in at the time of the grant. He cannot, however, by changing the character of the occupation of the land in respect of which the right of way exists impose a greater servitude upon the servient tenement. The question in each case is whether the alteration that may have taken place is of the substance or the mere quality of the thing, or whether, in other words, a more onerous burden is sought to be imposed upon the servient tenement (*h*). And in determining this question, the matter must be looked at from a reasonable point of view. A mere small alteration or addition to the burden will not be considered an illegal act (*i*). If, for instance, there be a grant of a right of way to a cottage, the right is not lost by reason of the cottage being altered (*k*). So also where a man having a right of way to his dwelling-house opened a small shop in one room of his house, it was held not to be such an alteration of the dominant tenement as would be an illegal excess of his right of way (*l*).

Deviation.

The grantee of a right of way which has been obstructed by the grantor has a right to deviate over the grantor's land, and is entitled to have this right protected by the Court so long as the obstruction exists without the necessity of proceeding against the grantor for the removal of the obstruction. The right exists as against a purchaser from the grantor with notice, and will be enforced by injunction (*m*).

Reservation.

The reservation of a right of way in a deed, executed by both grantor and grantee, operates as an easement created by way of grant from the grantee to the grantor (*n*), for a right

(*h*) *Allan* v. *Gomme*, 11 A. & E. 759, 772; 9 L. J. Q. B. 258; *Harris* v. *Flower & Co.*, (1904) W. N. 180; (1905), 74 L. J. Ch. 127; *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, (1907) 1 Ch. 208, 227; 75 L. J. Ch. 807; 76 L. J. Ch. 99; *Taff Vale Railway Co.* v. *Gordon-Canning*, (1909) 2 Ch. 48; 78 L. J. Ch. 492.

(*i*) *Wood* v. *Saunders*, 10 Ch. 582; 44 L. J. Ch. 514.

(*k*) *Henning* v. *Burnett*, 8 Ex. 187; 22 L. J. Ex. 79; *Skull* v. *Glenister*, 16 C. B. (N. S.) 81; 33 L. J. C. P. 185.

(*l*) *Sloan* v. *Holliday*, 30 L. T. 757.

(*m*) *Selby* v. *Nettleford*, 9 Ch. 111; 43 L. J. Ch. 359; *Stacey* v. *Sherrin*, (1913) 29 T. L. R. 555.

(*n*) *Durham and Sunderland Railway Co.* v. *Walker*, 2 Q. B. p. 967; 11 L. J. Ex. p. 446; 57 R. R. 842; *Lord Dynevor* v. *Tennant*, 33 C. D.

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of way cannot strictly be made the subject either of exception or reservation in a conveyance. Where a contract for sale reserved to the vendor a right of way over the land sold, and the conveyance contained a similar reservation, but was not executed by the purchaser, an injunction was granted restraining a mortgagee of the land who had notice of the reservation from interfering with the user of the way (*o*). The reservation implies such a wayleave as will be reasonably sufficient for carrying out the purposes for which the reservation was made (*p*). In *Bradburn* v. *Morris* (*q*), the owner of a field with a right of way to it through an occupation road, agreed to sell the surface of the field, reserving the minerals. The field had never been used for mining purposes, and the vendor did not appear to have any present intention of working the minerals. It was held that the vendor having had a right to use the road for agricultural purposes could not prevent the purchaser from so altering the road as to make it unfit for the use of the vendor in working the minerals under the land agreed to be sold. It was also held that even if the vendor had a right to use the road for minerals, inasmuch as he had no present intention of working the minerals, the Court would not interfere.

Acquisition of right of way by prescription or by presumption of lost modern grant.

A good title to a right of way may arise from proof of enjoyment from time immemorial (*r*), or for such time and under such circumstances as will satisfy the provisions of the Prescription Act, 2 & 3 Will. IV. c. 71, or upon the presumption of the existence of a modern grant which has been lost (*s*). Where there is a tenant for life in possession of settled land, a lost grant of a right of way cannot be implied as against

421; 13 A. C. 279; 57 L. J. Ch. 1078; see *May* v. *Belleville*, (1905) 2 Ch. 605; 74 L. J. Ch. 678.

(*o*) *May* v. *Belleville*, *supra*.

(*p*) *Dand* v. *Kingscote*, 6 M. & W. 174; 9 L. J. Ex. 279; *Proud* v. *Bates*, 34 L. J. Ch. 407; *Bidder* v. *North Staffordshire Railway Co.*, 4 Q. B. D. p. 429; 48 L. J. Q. B. 248.

(*q*) 3 C. D. 812.

(*r*) See *Wimbledon and Putney Commissioners* v. *Dixon*, 1 C. D. 362; 45 L. J. Ch. 353.

(*s*) *Gardner* v. *Hodgson's Kingston Brewery Co.*, (1903) A. C. [illegible] 72 L. J. Ch. 558; *Hulbert* [illegible]e, (1909) 2 Ch. pp. 576, 577, 78 L. J. Ch. [illegible]. 459.

the remainderman merely from the user of the way during the lifetime of the tenant for life, and from the fact that during the period of such user the remainderman joined with the tenant for life in barring the entail and in resettling the property (*t*).

Prescription Act.

By the 2nd and 4th sections of the Prescription Act, the continuous enjoyment as of right (*u*), of a way as an easement (*x*), for twenty years next before the commencement of some action, in which the claim has been brought in question, without interruption acquiesced in for a year (*y*), is evidence upon which a jury would be justified in presuming a right if the claim is otherwise good at common law (*z*). Where such way has been so enjoyed for the full period of forty years, the right thereto is absolute and indefeasible, unless it was enjoyed by some consent expressly given for that purpose by deed or writing (*a*).

Tenant cannot acquire easement by prescription over other land of his lessor.

It is a rule of the common law that a tenant cannot acquire by prescription an easement over land belonging to his landlord, for the possession and user by the tenant is the possession and user of his landlord (*b*). Nor under the Prescription Act can a tenant acquire an easement of way as against another tenant holding under the same landlord (*c*). Accordingly, where a plaintiff and a defendant were assignees of leases of adjoining tenements granted by the same lessor, and

(*t*) *Roberts* v. *James*, (1903) 89 L. T. 282.

(*u*) See *Tickle* v. *Brown*, 4 A. & E. p. 382; 5 L. J. K. B. 119; *Bright* v. *Walker*, 3 L. J. (N. S.) Ex. 250; *Gardner* v. *Hodgson's Kingston Brewery Co.*, (1903) A. C. 229, 239; 72 L. J. Ch. 558; *Kilgour* v. *Gaddes*, (1904) 1 K. B. p. 461; 73 L. J. K. B. 233.

(*x*) See *Damper* v. *Bassett*, (1901) 2 Ch. 350; 70 L. J. Ch. 657.

(*y*) *Ante*, pp. 189 *et seq.*

(*z*) See *Hollins* v. *Verney*, 13 Q. B. D. 304; 53 L. J. Q. B. 430.

(*a*) Prescription Act, sect. 2.

(*b*) *Gayford* v. *Moffatt*, 4 Ch. 133; *Outram* v. *Maude*, 17 C. D. p. 404; 50 L. J. Ch. 783; *Bayley* v. *Great Western Railway Co.*, 26 C. D. p. 441; 51 L. T. p. 339; *Kilgour* v. *Gaddes*, (1904) 1 K. B. p. 467; 73 L. J. K. B. 233.

(*c*) *Kilgour* v. *Gaddes*, (1904) 1 K. B. p. 460; 73 L. J. K. B. 233. See however as to the right to light, *Fear* v. *Morgan*, (1906) 2 Ch. 406; 75 L. J. Ch. 787, affirmed; *sub nom.* *Morgan* v. *Fear*, (1907) A. C. 425; 76 L. J. Ch. 660; *Richardson* v. *Graham*, (1908) 1 K. B. p. 45; 77 L. J. K. B. 27.

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a pump on the plaintiff's premises had been used as of right for a period of forty years before the commencement of the action by the occupiers of the defendant's premises, it was held, that no right of way had been acquired by the defendant to the use of the pump under sect. 2 of the Prescription Act. Such an easement can only be acquired under the section by the owner of the fee in one of the tenements, as against the owner of the fee in the other (*d*).

Limits of right when acquired by prescription.

If a right of way be acquired by prescription, the character and extent of the easement is fixed and determined by the use and enjoyment under which it has been gained. The right acquired must be measured by the extent of the enjoyment which is proved. The purpose for which the way may be used is limited by the actual user which has taken place during the whole period necessary for the acquisition of the right. The right of way cannot be increased so as substantially to impose a greater burden on the servient tenement (*e*). If the proof by usage be of a carriage way, a right of way for cattle is not necessarily established, though it may be competent evidence to go to a jury in connection with other evidence in establishing the extent of the right claimed (*f*). Nor will proof of usage of a way to bring goods to a tanyard, for the use of the tanyard, authorise the use of the way by other occupants, and for other purposes than the occupancy of the tanyard (*g*). Nor will proof of a prescriptive right to use a way in order to fetch water from a river, support a claim to use the way in order to fetch and carry goods (*h*), and a right to cart timber will not sustain a plea of a general right of way on foot, and with horses, waggons, and other carriages (*i*). Nor will

(*d*) *Kilgour* v. *Gadsden*, (1904) 1 K. B. 457; 73 L. J. K. B. 233.

(*e*) *Williams* v. *James*, L. R. 2 C. P. 582; *Wimbledon and Putney Commissioners* v. *Dixon*, 1 C. D. 368; *Harris* v. *Flower & Co.*, (1904) W. N. 180; (1905) 74 L. J. Ch. p. 132; *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, (1907) 1 Ch. p. 220; 75 L. J. Ch. 807; 76 L. J. Ch. 99.

(*f*) *Ballard* v. *Dyson*, 1 Taunt. 279; 9 R. R. 770.

(*g*) *Bower* v. *Hill*, 2 Bing. N. C. p. 339; 5 L. J. (N. S.) C. P. 77.

(*h*) *Knight* v. *Woore*, 3 Bing. N. C. 3; 6 L. J. C. P. 135.

(*i*) *Higham* v. *Rabbett*, 5 Bing. N. C. 622; 50 R. R. 811.

proof of user for certain purposes necessarily prove a general right of way for all purposes; the user, for instance, of a way to a field used only for agricultural purposes does not give a right of way for mineral purposes (*k*), and, if it appear that a way has been actually enjoyed for all the purposes for which the use or enjoyment of the premises at different times required its exercise, it is such evidence of a general right to use it for all purposes as to be a ground for inferring such a right, although for some of these purposes it may appear that the way was first, in fact, used within the period of twenty years (*l*). But proof of user of a way for all purposes for which a road was wanted for the enjoyment of property in its original state will not establish a right for all purposes in an altered condition of the property, where the effect would be to impose a greater burden on the servient tenement (*m*). Where, accordingly, a road had been immemorially used to a farm, not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farm house and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm, it was held that that did not establish a right of way for carting the materials required for building a number of new houses on the land (*n*).

Ways of necessity.

A right of way arises from necessity, where a man having a close, which is wholly surrounded by his land, sells the close. In such case the grantee is held by implication of law to have a way over the grantor's land, as a necessary incident to the grant, for without the way the grant would be useless (*o*). So also, where an owner of premises lets them to tenants in flats,

(*k*) *Bradburn* v. *Morris*, 3 C. D. 812.

(*l*) *Cowling* v. *Higginson*, 4 M. & W. p. 248; 7 L. J. Ex. 265; 51 R. R. 555; *Dare* v. *Heathcote*, 25 L. J. Ex. 245.

(*m*) *Wimbledon and Putney Commissioners* v. *Dixon*, 1 C. D. 362; 45 L. J. Ch. 353. See *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, (1907) 1 Ch. pp. 226, 227; 75 L. J. Ch. 807.

(*n*) *Wimbledon and Putney Commissioners* v. *Dixon*, *supra*.

(*o*) *Clark* v. *Cogge*, Cro. Jac. 170; *Gayford* v. *Moffatt*, 4 Ch. 133, p. 277; *Wheeldon* v. *Burrows*, 12 C. D. 31; 48 L. J. Ch. 853; *Union Lighterage Co.* v. *London Graving Dock Co.*, (1902) 2 Ch. p. 572; 71 L. J. Ch. p. 799; *Browne* v. *Flower*, (1911) 1 Ch. p. 225; 80 L. J. Ch. p. 184.

retaining the staircase in his occupation and control, an easement over the staircase is impliedly granted to the tenants for the purpose of the enjoyment of their respective flats (*p*). The principle has been carried so far as to be applied to the case of a trustee selling land he held in trust, and to which there was no access but over the trustee's own land (*q*). The principle, it appears, is applicable, if the close granted be not entirely surrounded by the land of the grantor, but partly by the land of a stranger (*r*), but the Court refused to extend the principle to the case of a grant where one side of the land conveyed abutted on a highway twenty feet below it (*s*). So, also, and upon the same principle, if a man grants trees growing on his land to another, the grantee may enter upon the land for the purpose of cutting them down and carrying them away (*t*). So, also, where trees have been excepted by the lessor on an estate demised, the law gives him, and those claiming under him, power, as incident to the exception, to enter upon the land and cut the trees (*u*). So, also, if a man gives another a licence to lay pipes of lead in his land, to convey water to a cistern, he may enter upon the land and dig therein to clean or mend the pipes (*x*); and an injunction will be granted, if necessary, to protect the easement (*y*).

The grant that carries with it a right of way by necessity, does not necessarily imply a carriage way, even though the thing granted is a house. But the grant of tillage land implies a carriage way, because such a way is necessary in order to carry off the crops, unless by the custom of the vicinage the crops are carried off by men instead of teams (*z*).

A way of necessity arises also by implication of law, where

(*p*) *Miller* v. *Hancock*, (1893) 2 Q. B. p. 180; 69 L. T. p. 215.

(*q*) *Howton* v. *Frearson*, 8 T. R. 50; 4 R. R. 581.

(*r*) 2 Roll. Ab. 60; *Osborne* v. *Wise*, 7 C. & P. 763; 48 R. R. 846.

(*s*) *Titchmarsh* v. *Royston Water Co.*, (1899) W. N. 256; 81 L. T. 673.

(*t*) Plowd. Comm. 16.

(*u*) *Liford's case*, 11 Co. Rep 51 b, 52 a; *Darcy* v. *Askwith*, Hob. 234.

(*x*) *Pomfret* v. *Ricroft*, 1 Wms. Saund. 321. See *Jones* v. *Pritchard*, (1908) 1 Ch. p. 638; 77 L. J. Ch. p. 409.

(*y*) *Goodhart* v. *Hyett*, 25 C. D. 182; 32 W. R. 165.

(*z*) *Osborne* v. *Wise*, 7 C. & P. p. 765; 48 R. R. 846; and see *Cannon* v. *Villars*, 8 C. D. p. 421; 47 L. J. Ch. p. 599.

a man, having several closes of land, sells all but one, which is completely surrounded by those which he has sold. In such cases, a right of way by necessity over the surrounding closes which he has sold is presumed by implication of law to be reserved in favour of the grantor (*a*). In a case where the purchaser of a close of land had notice that the adjoining land retained by the vendor was to be laid out in building, in a manner which would make a right of way over the purchased land necessary to the vendor, it was held that such right of way was reserved to the vendor by implication as a way of necessity (*b*). But if the close retained by the vendor is agricultural land and the purchaser has no notice that the vendor intends to lay it out in building, the owner of the close can only claim such a right of way as is suitable to the enjoyment of land in that condition. He cannot claim a right of way suitable to the user of the close as building land (*c*). Where the owner of several closes of land had executed deeds of conveyance to three purchasers on the same day, it was held that the purchasers were entitled to rights of way, independently of any special grant or reservation of any particular way (*d*).

Ways of necessity.

A man cannot claim a way of necessity by reason of its superior convenience over another way which he has (*e*). Where a grantee is entitled to a way of necessity over another tenement belonging to the grantor and there are to the tenement granted more ways than one, the grantee is entitled to one way only which the grantor may select (*f*). There may be, it would appear, a way of necessity, at least in favour of a

(*a*) *Clark* v. *Cogge*, Cro. Jac. 170; *Pinnington* v. *Galland*, 9 Ex. 1; 22 L. J. Ex. 348; *London Corporation* v. *Riggs*, 13 C. D. 798; 49 L. J. Ch. 297; *Union Lighterage Co.* v. *London Graving Dock Co.*, (1902) 2 Ch. 557, 572; 71 L. J. Ch. p. 795; *Ray* v. *Hazeldine*, (1904) 2 Ch. pp. 19, 20; 73 L. J. Ch. p. 539.

(*b*) *Davies* v. *Sear*, 7 Eq. 427; 38 L. J. Ch. 545. See *Wheeldon* v. *Burrows*, 12 C. D. p. 58; 48 L. J. Ch. 853; *Serff* v. *Acton Local Board*, 31 C. D. 679; 55 L. J. Ch. 569.

(*c*) *Corporation of London* v. *Riggs*, 13 C. D. 798; 49 L. J. Ch. 297.

(*d*) *Pinnington* v. *Galland*, 9 Ex. 1; 22 L. J. Ex. 348.

(*e*) *Morris* v. *Edgington*, 3 Taunt. 31; 12 R. R. 579; *Dodd* v. *Burchall*, 1 H. & C. 119; 31 L. J. Ex. 364.

(*f*) *Bolton* v. *Bolton*, 11 C. D. p. 971; 48 L. J. Ch. 467.

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grantee of land, even although there be no absolute necessity for the right claimed. The right may be implied where a tenement is so constructed as that part of it involves a necessary dependence on other parts, in order to its enjoyment in the state in which it was at the time of the grant (*g*). It would seem, however, that a reservation of a right of way in favour of a *grantor* will not arise from implication of law, unless the way be one of absolute necessity (*h*). In *Holmes* v. *Goring* (*i*) it was laid down that a way of necessity is limited by the necessity which created it, and will cease if, at any subsequent period, the party entitled to it can approach the place to which it led by passing over his own land. But in *Proctor* v. *Hodgson* (*k*), Lord Wensleydale said he considered the Court was wrong in *Holmes* v. *Goring*, and that he should have thought that an implied way of necessity "meant as much a grant for ever as if expressly inserted in the deed."

Direction of way of necessity.

The authorities determine that the person by whose act a way of necessity is created, in other words the grantor, should designate the way, subject, however, to this, that the way should be a reasonable and convenient one (*l*). In general, especially in cases where there is an occupation by a tenant, there must be an actual existing way, by which the premises are used and enjoyed; and in such case the intention of the testator, if the severance of the heritage be by will, is best

(*g*) *Pearson* v. *Spencer*, 3 B. & S. 760; 124 R. R. 667. *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, (1907) 1 Ch. p. 220; 75 L. J. Ch. 810. Comp. *Espley* v. *Wilkes*, L. R. 7 Ex. p. 303; 41 L. J. Ex. 241.

(*h*) *Suffield* v. *Brown*, 4 De G. J. & S. 185; 33 L. J. Ch. 249; and see *Midland Railway Co.* v. *Miles*, 33 C. D. p. 644; 55 L. J. Ch. p. 749; *Taws* v. *Knowles*, (1891) 2 Q. B. 564; 60 L. J. Q. B. 641; *Union Lighterage Co.* v. *London Graving Dock Co.*, (1902) 2 Ch. 557, 570; 71 L. J. Ch. 795; *Ray* v. *Hazeldine*, (1904) 2 Ch. pp. 19, 20; 73 L. J. Ch. p. 539.

(*i*) 2 Bing. 76; 2 L. J. C. P. 134; 27 R. R. 549.

(*k*) 10 Exch. p. 828; 24 L. J. Ex. 197; 102 R. R. 862.

(*l*) *Clarke* v. *Rugge*, 2 Roll. Ab. 60; *Pearson* v. *Spencer*, 1 B. & S. 571; 124 R. R. 656; *Bolton* v. *Bolton*, 11 C. D. 971; 48 L. J. Ch. 467; *Brown* v. *Alabaster*, 37 C. D. p. 500; 57 L. J. Ch. p. 257; *Deacon* v. *South Eastern Railway Co.*, 61 L. T. 377; and see *Re Peck and The London School Board*, (1893) 2 Ch. p. 320.

effectuated by construing the implied grant of a way to be a grant of that way actually used at the time of his death (*m*). It is difficult to say how the way ought to be set out if the premises before severance are so occupied as to afford no indication of what was the usual way in the testator's lifetime (*n*). A way of necessity, when once created, must remain the same so long as it continues at all (*o*). If there are two ways, each of necessity, the owner of the dominant tenement will be entitled to that which is most convenient to him (*p*).

Abandonment and non-user.

The right to an easement of way may be lost by abandonment. Mere non-user of a way, however, does not amount to abandonment (*q*). The question of abandonment is one of intention, to be decided on the facts of each particular case. No definite time has been fixed by law during which a cessation of enjoyment must continue in order to amount to evidence of abandonment. The question always is whether, under the circumstances of the case, an intention to abandon the right permanently can be reasonably presumed. The mere suspension of the exercise of the right is not sufficient to prove an intention to abandon it. The period of time during which the non-user has continued is only material as an element in forming a presumption as to the intention. What period may be sufficient in any particular case must depend on all the accompanying evidence (*r*). In *Ward* v. *Ward* (*s*), accordingly, it was held that a right of way was not lost by non-user for upwards of twenty years, the user having been discontinued merely by reason of the party having a more convenient

(*m*) *Pearson* v. *Spencer*, 1 B. & S. p. 585; 3 B. & S. 761; 124 R. R. 656, 667. See *Milner's Safe Co.* v. *Great Northern and City Railway Co.*, (1907) 1 Ch. 208; 75 L. J. Ch. 807; compromised in C. A., (1907) 1 Ch. 229; 76 L. J. Ch. 99.

(*n*) *Pearson* v. *Spencer*, *supra*.

(*o*) *Pearson* v. *Spencer*, 1 B. & S. 571; 3 B. & S. 761; 124 R. R. 656, 667.

(*p*) *Morris* v. *Edgington*, 3 Taunt. 24, 31; 12 R. R. 579; *Barlow* v. *Rhodes*, 1 Cr. & M. 439; 2 L. J. Ex. 91; *Pheysey* v. *Vicary*, 16 M. & W. 492, 495; 73 R. R. 583.

(*q*) *James* v. *Stevenson*, (1893) A. C. 162; 62 L. J. P. C. 51; *Young* v. *Star Omnibus Co.*, (1902) 86 L. T. 41; *Harris* v. *Flower & Co.*, (1904) W. N. 180; (1905) 74 L. J. Ch. 127.

(*r*) *Reg.* v. *Chorley*, 12 Q. B. p. 519; 76 R. R. 330; see *Harris* v. *Flower*, *supra*.

(*s*) 7 Ex. 838; 21 L. J. Ex. 334; 86 R. R. 852.

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way. So, also, a parol agreement for the substitution of a new way for an old one, and a consequent discontinuance to use the old way, were held not to afford evidence of an intention to abandon the old way (*t*).

The mere manifestation of an intention to abandon the right, is not necessarily sufficient to destroy the right (*u*). But if the dominant owner does anything showing a clear intention of abandoning the right it cannot be afterwards set up (*x*). So again, if an intention to abandon the right can be reasonably presumed, and the owner of the servient tenement, upon the faith of such a belief, has been induced to incur expense or alter his condition, the owner of the dominant tenement will be held to have precluded himself by his conduct from afterwards setting up that the right has not been abandoned (*y*).

Suspension of right of way by alteration of dominant tenement.

Where a railway company acquired premises with a right of way for domestic and ordinary business purposes, and pulled down the buildings, and erected a railway station in their place, it was held that the company could not use the way for passengers going to and from the station, and that as the user of the way by the dominant tenement had become entirely different from the user contemplated by the grantor of the way, the original right of way was for the time being suspended (*z*).

Extinguishment and merger.

A right of way enjoyed by the owner of one tenement over another tenement becomes extinguished upon unity of seisin and possession of both tenements in the same person, and merges in the general rights of property (*a*).

Public and private way may exist over same road.

A private right of way, however, is not necessarily merged and extinguished in a public right of way, if the latter right

(*t*) *Lovell* v. *Smith*, 3 C. B. N. S. 120.

(*u*) See *Moore* v. *Rawson*, 3 B. & C. 332; 3 L. J. (O. S.) K. B. 32: 27 R. R. 375: *Crossley* v. *Lightowler*, 2 Ch. 482; 36 L. J. Ch. 588; *Young* v. *Star Omnibus Co.*, 86 L. T. 41.

(*x*) *Midland Railway Co.* v. *Gribble*, (1895) 2 Ch. 827, 831; 64 L. J. Ch. 826.

(*y*) *Reg.* v. *Chorley*, 12 Q. B. 517 76 R. R. 330.

(*z*) *Milner's Safe Co.* v. *Great Northern and City Railway Co* (1907) 1 Ch. 208; 75 L. J. Ch. 80 compromised in C. A., (1907) 1 Ch 229; 76 L. J. Ch. 99.

(*a*) *James* v. *Plant*, 4 A. & E 761; 6 L. J. Ex. 260; 43 R. R 465; and see *Damper* v. *Basset* (1901) 2 Ch. 350; 70 L. J. Ch. 65

is acquired over the same soil where the private right exists (*b*). It is, therefore, no answer to an action for obstructing a private right of way to say that a public right of way has been acquired over the same road (*c*).

The General Inclosure Act, 8 & 9 Vict. c. 118, sect. 68, provides that all roads and ways not set out by the valuer in making his award shall be for ever stopped up and extinguished (*d*).

Pleadings.

In actions to restrain the obstruction of a private way, the plaintiff ought to show in his statement of claim, whether he claims the right by grant or by prescription, and he ought also to allege, with reasonable certainty, the termini of the way and its course (*e*).

In claiming a right of way under the presumption of a lost grant it is not necessary to allege the date of, or parties to, the deed of grant, but if the plaintiff relies on the grant as having been made before or after a particular date, this should be stated (*f*).

When reversioner can sue.

A reversioner cannot sue for interference with his right of way, unless the interference is of a permanent character, or operates as a denial of his right (*g*).

Abatement.

In addition to the remedy by action for an injunction and damages, the owner of a right of way is entitled to remove the obstruction himself, but his right to abate the nuisance should

Richardson v. *Graham*, (1908) 1 K. B. 41, 42; 77 L. J. K. B. 27.

(*b*) *Reg.* v. *Chorley*, 12 Q. B. 515; 76 R. R. 330; *Brownlow* v. *Tomlinson*, 1 Man. & G. 484; *Wells* v. *London, Tilbury, and Southend Railway Co.*, 5 C. D. 126; 37 L. T. 362; and see *Att.-Gen.* v. *Esher Linoleum Co.*, (1901) 2 Ch. 647; 70 L. J. Ch. 808.

(*c*) *Allen* v. *Ormond*, 8 East, 4; 9 R. R. 363; *Duncan* v. *Louch*, 6 Q. B. p. 915; 14 L. J. Q. B. 185; 66 R. R. 592.

(*d*) See *Turner* v. *Crush*, 4 A. C. 221; 48 L. J. Ex. 481; *Reynolds* v. *Barnes*, (1909) 2 Ch. 361, 370; 78 L. J. Ch. 641.

(*e*) *Harris* v. *Jenkins*, 22 C. D. 481; 52 L. J. Ch. 437; *Donnelly* v. *Adams*, (1905) 1 Ch. p. 181. See *Sledge* v. *Pomfret*, (1905) W. N. 56; 74 L. J. Ch. 357 (watercourse).

(*f*) *Palmer* v. *Guadagni*, (1906) 2 Ch. 494; 75 L. J. Ch. 721.

(*g*) *Kidgill* v. *Moor*, 9 C. B. 364; 19 L. J. C. P. 177; *Bell* v. *Midland Railway Co.*, 10 C. B. (N. S.) 287; 30 L. J. C. P. 273; *Mayfair Property Co.* v. *Johnston*, (1894) 1 Ch. pp. 516—519; *Jones* v. *Llanrwst Urban Council*, (1911) 1 Ch. p. 464; 80 L. J. Ch. p. 150.

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not be exercised until after the wrongdoer has been served with a proper notice and request to remove the obstruction, and has refused or neglected to do so. The right of abatement is not lost by the fact that the Court has refused to grant a mandatory injunction for the removal of the obstruction (*h*).

Locking gates an obstruction though keys offered.

Locking gates across a way is an obstruction of the free right of way, and it is no answer to the plaintiff's claim to say that keys will be supplied (*i*).

Obstruction of private way by obstruction in a public road.

The right of the owner of roadside property to have access thereto is a totally different right from the public right of passing and re-passing along the highway. The right of a man to step from his own land on to a highway is quite a different right from the public right of using the highway (*k*). If a private way leads into a public road, an action will lie for obstruction of the private way, although the obstruction is actually placed in the public road (*l*), and in such case, the owner of the private way can sue without joining the Attorney-General (*m*). But the *private* right of access which the owner of property adjoining a highway is entitled to does not extend to the carriage of goods to and from his premises. The right of such owner to carry goods across the pavement to or from the highway, is a right enjoyed by him *as one of the public.* It is in fact part of the right so to use the highway at the spot in question as to enjoy the same reasonably in common with other members of the public entitled to use the same (*n*). In case of doubt or difficulty the right of the occupier of premises

(*h*) *Lane* v. *Capsey*, (1891) 3 Ch. 411; 61 L. J. Ch. 55.

(*i*) *Guest's Estates Co.* v. *Milner's Safes Co.*, (1912) 28 T. L. R. 59.

(*k*) *Att.-Gen.* v. *Thames Conservators*, 1 H. & M. p. 31; *Chaplin & Co., Ltd.* v. *Westminster Corporation*, (1901) 2 Ch. 329; 70 L. J. Ch. 679.

(*l*) *Rose* v. *Groves*, 5 Man. & G. 613; 12 L. J. C. P. 251; 63 R. R. 415; *Lyon* v. *Fishmongers' Co.*, 1 A. C. 662; *Benjamin* v. *Storr*, L. R. 9 C. P. p. 406; *Fritz* v. *Hobson*, 14 C. D. 542; *Caledonian, etc., Railway Co.* v. *Walker's Trustees*, 7 A. C. 285; and see *Barber* v. *Penley*, (1893) 2 Ch. 452, 453; 62 L. J. Ch. p. 625; *Boyce* v. *Paddington Borough Council*, (1903) 1 Ch. p. 114; 72 L. J. Ch. p. 32; *Campbell* v. *Paddington Corporation*, (1911) 1 K. B. 876; 80 L. J. K. B. 743.

(*m*) *Boyce* v. *Paddington Borough Council*, (1903) 1 Ch. p. 114; 72 L. J. Ch. p. 32.

(*n*) *Chaplin & Co., Ltd.* v. *Westminster Corporation*, (1901) 2 Ch. 329; 70 L. J. Ch. 679.

abutting on a highway to make a reasonable use of it, for the purpose of loading and unloading goods at his premises, must yield to the public right of unobstructed passage along the highway (*o*).

In *Thorpe* v. *Brumfitt* (*p*) the continual obstruction of a private way to an inn yard, by loading and unloading waggons, was restrained by injunction; although the obstructions were not created by one defendant alone, but by several who had warehouses abutting on the way, and although the obstruction created by each separately might not have been sufficient of itself to support the action (*q*).

Where a local board is a highway authority, it has the power to alter for the accommodation of the public the level of any street, though such alteration may interfere with the free access of the adjoining owners to their property abutting on the street. Any remedy which the adjoining owners may have except on the ground of unreasonable conduct on the part of the local authority, should be by way of compensation under sect. 308 of the Public Health Act, 1875, and not by injunction (*r*).

SECTION 7.—NUISANCES TO HIGHWAYS.

ANOTHER class of cases in which the equitable remedy by injunction is sought are nuisances to public roads or highways.

What is a highway.

A highway is a road given to the public *prima facie* for passing (*s*) from one public place to another public place (*t*),

(*o*) *Att.-Gen.* v. *Brighton Supply Association*, (1900) 1 Ch. 276; 69 L. J. Ch. 204.

(*p*) 8 Ch. 650.

(*q*) See also *Lambton* v. *Mellish*, (1894) 3 Ch. 163, 166; 63 L. J. Ch. p. 930; R. S. C. Ord. xvi., r. 4.

(*r*) *Sellors* v. *Matlock Board of Health*, 14 Q. B. D. 929; 52 L. J. 762. See *Atherton* v. *Cheshire County Council*, 60 J. P. 6; *Lingke* v. *Christchurch Corporation*, (1912) 3 K. B. 595; 82 L. J. K. B. 37 (drainage).

(*s*) *Harrison* v. *Duke of Rutland*, (1893) 1 Q. B. p. 146; 62 L. J. Q. B. 117; *Hickman* v. *Maisey*, (1900) 1 Q. B. p. 755; 69 L. J. Q. B. 511; *Att.-Gen.* v. *Blackpool Corporation*, (1907) 71 J. P. 478; *Fitzhardinge* (*Lord*) v. *Purcell*, (1908) 2 Ch. p. 168; 77 L. J. Ch. p. 546. The public in addition to the right of passage can use the highway in the

(*t*) For note (*t*) see next page.

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whether it be a carriage way, a footway, or a horse-and-cart way (*u*). A highway need not necessarily be a thoroughfare; a cul-de-sac may be highway (*x*); but the dedication of a cul-de-sac as a highway will not, it seems, be presumed from mere user by the public without evidence of expenditure thereon by the local authority (*y*); nor is it necessary that the terminus of a highway should be itself a public place, if it lead to a public place (*z*).

Modes of creating a highway.

A highway may be created either by statute (*a*), or by the dedication to the public by the owner in fee (*b*) (or in certain cases by a limited owner (*c*)) of the surface of his land for the purpose of passing and re-passing (*d*). In order to prove

ordinary and usual way (*Harrison* v. *Duke of Rutland*, (1893) 1 Q. B. p. 146; 62 L. J. Q. B. 117; *Hadwell* v. *Righton*, (1907) 2 K. B. p. 348; 76 L. J. K. B. p. 895); *Lingké* v. *Christchurch Corporation*, (1912) 3 K. B. 601, 602; 82 L. J. K. B. 42; and see *Burden* v. *Rigler*, (1910) 27 T. L. R. 140, as to holding a meeting on the highway.

(*t*) *Campbell* v. *Lang*, 1 Macq. 451; *Bourke* v. *Davis*, 44 C. D. 110, 121; 38 W. R. 167; *Harrison* v. *Duke of Rutland*, *supra*; *Hickman* v. *Maisey*, (1900) 1 Q. B. 765; 69 L. J. Q. B. 511; *Att.-Gen.* v. *Antrobus*, (1905) 2 Ch. 188, 206; 74 L. J. Ch. 599.

(*u*) *Rex* v. *Salop* (*Inhabitants of*), 13 East, p. 97. As to the definition of a highway, see Highway Act, 1835, s. 5.

(*x*) *Bateman* v. *Bluck*, 18 Q. B. 870; 21 L. J. Q. B. 406; 88 R. R. 813; *Young* v. *Cuthbertson*, 1 Macq. 455; *Vernon* v. *Vestry of St. James'*, 16 C. D. p. 457; 50 L. J. Ch. 81; *Bourke* v. *Davis*, 44 C. D. 110, 123; 38 W. R. 167; *Att.-Gen.* v. *Richmond Corporation*, (1904) 89 L. T. 700; *Att.-Gen.* v. *Antrobus*, (1905) 2 Ch. p. 206; 74 L. J. Ch. p. 608; *Whitehouse* v. *Hugh*, (1906) 1 Ch. p. 264; 75 L. J. Ch. p. 157; (1906) 2 Ch. 283; 75 L. J. Ch. 677; *Att.-Gen.* v. *Chandos Land and Building Society*, (1910) 74 J. P. 401; *Josselsohn* v. *Wailer*, (1911) 75 J. P. 513; and see *London County Council* v. *Hughes*, (1911) 104 L. T. 685, as to dedication where an estate is being administered by the Court.

(*y*) *Att.-Gen.* v. *Antrobus*, *Whitehouse* v. *Hugh*, *supra*; but see *Att.-Gen.* v. *Chandos*, (1910) 74 J. P. 401.

(*z*) *Campbell* v. *Lang*, 1 Macq. 451; *Att.-Gen.* v. *Antrobus*, *Att.-Gen.* v. *Chandos Land and Building Society*, *supra*.

(*a*) E.g., by trustees under Turnpike Acts, or by Commissioners under Inclosure Acts, or by a Road Board under 9 Edw. 7, c. 47, see sects. 8 and 9, or by a Local Authority see 9 Edw. 7, c. 44, sect. 6.

(*b*) See *Att.-Gen.* v. *Antrobus*, (1905) 2 Ch. p. 201; 74 L. J. Ch. 599; *Farquhar* v. *Newbury Rural Council*, (1909) 1 Ch. 12; 78 L. J. Ch. 170.

(*c*) See sect. 16 of Settled Land Act, 1882, and sect. 20 of Settled Estates Act, 1877.

(*d*) See cases note (*s*), *supra*.

a public way created by Act of Parliament, it is necessary to show that the provisions of the Act have been strictly followed (*e*).

Dedication.

The dedication by an owner of the surface of his land to the use of the public, has not the effect of divesting him of the ownership of the soil, or of vesting the soil in the local authority to the use of the public. An owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and so much of the actual soil as may be required for the maintenance and preservation of the right of passage (*f*), and he may exercise all rights of ownership not inconsistent with such dedication. Highways are dedicated *primâ facie* for the purpose of passage only, and the user of a highway otherwise than in the ordinary and usual way, is a trespass as against the owner of the soil and in a proper case will be restrained by injunction (*g*). The appropriation made to and adopted by the public, of a part of the street to one kind of passage, and another part to another, does not deprive him at common law of any rights as owner of the land which are not inconsistent with the right of passage by the public. The provision of the Highway and Metropolis Local Management Acts, so far as they apply to roads and streets, are subordinate to the paramount rights reserved by the owner (*h*).

Who can dedicate.

A dedication to be valid must be made by the owner of the fee (*i*), or by the tenant for life and remainderman in fee

(*e*) *Cubitt* v. *Maxse*, L. R. 8 C. P. p. 715; 42 L. J. C. P. 278.

(*f*) See *Mayor of Tunbridge Wells* v. *Baird*, (1896) A. C. 434; 65 L. J. Q. B. 451; *Foley's Charity Trustees* v. *Dudley Corporation*, (1910) 1 K. B. p. 322; 79 L. J. K. B. p. 415; *Andrews* v. *Abertillery Urban Council*, (1911) 2 Ch. p. 413; 80 L. J. Ch. p. 741; *Schweder* v. *Worthing Gas Light and Coke Co.*, (1913) 1 Ch. p. 124; 82 L. J. Ch. 673.

(*g*) *Hickman* v. *Maisey*, (1900) 1 Q. B. p. 755; 69 L. J. Q. B. 511; see *Fidden* v. *Cox*, (1904) 22 T. L. R. 411 (catching moths), where an injunction was refused.

(*h*) *St. Mary Newington Vestry* v. *Jacobs*, L. R. 7 Q. B. 47; 41 L. J. M. C. 72; and see *Harrison* v. *Duke of Rutland*, (1893) 1 Q. B. p. 157; 62 L. J. Q. B. 117; *Luscombe* v. *Great Western Railway Co.*, (1899) 2 Q. B. p. 316; 68 L. J. Q. B. 711.

(*i*) *Wood* v. *Veal*, 5 B. & Ald. 454; 24 R. R. 454; *Eyre* v. *New Forest Highway Board*, 56 J. P. 517; *Att.-Gen.* v. *Antrobus*, (1905) 2 Ch. pp. 201, 202; 74 L. J. Ch. 599; *Att.-Gen.* v. *Chandos Land and*

together (*k*), or by a limited owner under statutory powers (*l*). A corporation may dedicate, provided the dedication is not incompatible with its statutory objects (*m*). There can be no dedication, unless there be an intention to dedicate (*n*), and such intention must be unequivocally proved. But it may be manifested by writing, by declaration, or by acts. The mere acting so as to lead persons into a supposition that a way is dedicated does not amount to a dedication, if there be an agreement which explains the transaction (*o*). Nor is there a dedication, though there may have been originally an intention to dedicate, if the intention to dedicate has been abandoned or something has been done to show that the original intention has been abandoned (*p*).

If an intention to dedicate can be clearly shown, no particular time is necessary to render the dedication valid. It may be immediate, or as soon as some act is done on the part of the public, or persons claiming an interest in such

Building Society, (1910) 74 J. P. 401; *Webb* v. *Baldwin*, (1911) 75 J. P. 564.

(*k*) *Farquhar* v. *Newbury Rural Council*, (1909) 1 Ch. 12; 78 L. J. Ch. 170.

(*l*) See Settled Land Act, 1882, s. 16, and Settled Estates Act, 1877, s. 20.

(*m*) *Rex* v. *Leake* 5 B. & Ad. 469; 39 R. R. 521; *Mulliner* v. *Midland Railway Co.*, 11 C. D. p. 623; 48 L. J. Ch. 258; *Grand Junction Canal Co.* v. *Petty*, 21 Q. B. D. 273; 57 L. J. Q. B. 572; *Stretford Urban Council* v. *Manchester South Junction Railway Co.*, (1903) 19 T. L. R. 546; *Att.-Gen.* v. *London and South Western Railway Co.*, (1905) 21 T. L. R. 220; *Taff Vale Railway Co.* v. *Pontypridd Urban Council*, (1905) 93 L. T. pp. 129, 130; *Coats* v. *Herefordshire County Council*, (1909) 2 Ch. 579; 78 L. J. Ch. 568, 781; *Arnott* v. *Whitby Urban Council*, (1909) 101 L. T. 14; *Arnold* v. *Morgan*, (1911) 2 K. B. 314; 80 L. J. K. B. p. 955; *Great Central Railway Co.* v. *Ballywith, Hexthorpe Urban Council*, (1912) 2 Ch. 110; 81 L. J. Ch. 596; a right of pre-emption in adjoining owners does not prevent dedication, *Coates* v. *Herefordshire County Council*, *supra*.

(*n*) *Woodyer* v. *Hadden*, 5 Taunt. 125; 14 R. R. 706; *Barraclough* v. *Johnson*, 8 A. & E. 99; 7 L. J. Q. B. 172; 47 R. R. 506; *Simpson* v. *Att.-Gen.*, (1904) A. C. pp. 493, 494; 74 L. J. Ch. p. 11; *Att.-Gen.* v. *Antrobus*, (1905) 2 Ch. p. 201; 74 L. J Ch. 599; *Holloway* v. *Egham District Council*, (1908) 72 J. P. 433; see *Kirby* v. *Paignton Urban Council*, (1913) 1 Ch. 337, 347; 82 L. J. Ch. 198.

(*o*) *Woodyer* v. *Hadden*, *Barraclough* v. *Johnson*, *Simpson* v. *Att.-Gen.*, *supra*.

(*p*) *Hall* v. *Bootle Corporation*, 29 W. R. 862; 44 L. T. 873 (plans of street passed by local authority); see *Kirby* v. *Paignton Urban Council*, *supra*.

dedication, denoting their intention of accepting the gift (*q*). A mere dedication by the owner of the soil will not of itself create a highway. There must also be an acceptance by the public. Dedication by the owner, and user by the public, must concur to create a road otherwise than by statute (*r*).

Where there is a public right of footway across land, and there is some surface land lying along the course of the public footpath, devoted to traffic, even if it be private traffic, then *primâ facie* the owner of the soil must be taken to have dedicated to the public so much of the surface as he has in point of fact devoted to traffic, even though it be private traffic (*s*).

Dedication presumed from public user.

Enjoyment and user of a way by the public openly as of right (*t*) is evidence from which an intention to dedicate may be presumed (*u*). The continued user by the public of a way raises the presumption that the way belongs to the public, that it has been dedicated by the owner for the public use for which it has been used. It is not incumbent upon the public to show by what particular owner the road has been dedicated. If dedication is possible, dedication will be assumed. But it is open to the owner of the soil to establish that owing to the

(*q*) *Poole* v. *Huskisson*, 11 M. & W. 826; 63 R. R. 782; *North London Railway Co.* v. *St. Mary's Vestry*, 21 W. R. 226; 27 L. T. 672.

(*r*) *Cubitt* v. *Maxse*, L. R. 8 C. P. 715; 42 L. J. C. P. 278; *Mackett* v. *Herne Bay Commissioners*, 37 L. T. 873; *Att.-Gen.* v. *Biphosphated Guano Co.*, 11 C. D. 327; 49 L. J. Ch. 68; *Holloway* v. *Eyhum Urban Council*, (1908) 72 J. P. p. 434; *Tottenham Urban Council* v. *Rowley*, (1912) 2 Ch. 643; 82 L. J. Ch. 84.

(*s*) *Att.-Gen.* v. *Esher*, (1901) 2 Ch. 647; 70 L. J. Ch. 808.

(*t*) *Att.-Gen.* v. *Antrobus*, (1905) 2 Ch. p. 202; 74 L. J. Ch. 599. See *Behrens* v. *Richards*, (1905) 2 Ch. pp. 619, 620; 74 L. J. Ch. 615; *Coats* v. *Herefordshire County Council*, (1909) 2 Ch. p. 594; 78 L. J. Ch. 568, 781; *Trafford* v. *St. Faith's Rural Council*, (1910) 74 J. P. p. 297; *Webb* v. *Baldwin*, (1911) 75 J. P. 564; *Kirby* v. *Paignton Urban Council*, (1913) 1 Ch. 346, 347; 82 L. J. Ch. 198.

(*u*) See *Poole* v. *Huskisson*, 11 M. & W. 827; 63 R. R. 782; *Reg.* v. *East Mark Tything*, 11 Q. B. 877; 17 L. J. Q. B. 877; 75 R. R. 653; *Reg.* v. *Petrie*, 4 El. & Bl. 737; 24 L. J. Q. B. 167; 99 R. R. 718; *Jarvis* v. *Dean*, 3 Bing. 447; 4 L. J. (O. S.) C. P. 144; *Dawes* v. *Hawkins*, 8 C. B. N. S. 848; 29 L. J. C. P. 343; *Turner* v. *Walsh*, 6 A. C. 642; 50 L. J. P. C. 55; *Mann* v. *Brodie*, 10 A. C. p. 386; *Farquhar* v. *Newbury Rural Council*, (1909) 1 Ch. 12; 78 L. J. Ch. 170; *Att.-Gen.* v. *Watford Rural Council*, (1912) 1 Ch. 417; 81 L. J. Ch. 281; *East* v. *Berkshire County Council*, (1912) 106 L. T. 65; 76 J. P. 35.

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condition of the title dedication was not possible, and if he shows that, then the presumption which results from the continued user is rebutted. But notwithstanding that it is shown that for a long period dedication has been impossible, it is open to the Court to infer, if the facts will justify the inference, that dedication may have taken place, and if it may have taken place, that it did take place before the period during which dedication was impossible (*x*). Where the character of the user has left no doubt as to the intention to dedicate by the owner of the land over which the way ran and the assertion of the right on the part of the public, a user of not many years continuance may be sufficient to establish the right (*y*). The idea of dedication may be rebutted by the nature of the *locus in quo*, and by the character of the user, as where persons had been allowed to stroll along cliffs, the landowner permitting what caused him no injury, while his refusal would have been an unreasonable act (*z*); or by evidence of acts showing that the owner of the soil contemplated only a licence revocable in a particular event (*a*). The erection of a post or gate at the entrance of the way, or other similar acts, will negative the intention to dedicate (*b*). But acts of ownership relied on as rebutting an intention to dedicate, may be referable to the ownership of the soil rather than to an intention to exclude the passage of the public (*c*). A single act of interruption by the owner of the fee is of much more weight

Intention to dedicate rebutted.

(*x*) *Farquhar* v. *Newbury Rural Council*, (1908) 2 Ch. p. 596; (1909) 1 Ch. 12; 78 L. J. Ch. p. 175; and see *Coats* v. *Herefordshire County Council*, (1909) 2 Ch. 595, 596; 78 L. J. Ch. 568; *Paris* v. *Lymington Rural Council*, (1911) 75 J. P. (Jo.) 88.

(*y*) *Att.-Gen.* v. *Biphosphated Guano Co.*, 11 C. D. p. 341; 49 L. J. Ch. 68.

(*z*) *Behrens* v. *Richards*, (1905) 2 Ch. 614, 620; 74 L. J. Ch. p. 618.

(*a*) *Barraclough* v. *Johnson*, 8 A. & E. 99, 104; 7 L. J. Q. B. 172; 47 R. R. 506.

(*b*) *Roberts* v. *Karr*, 1 Camp. 262, n.; *Rugby Charity* v. *Merryweather*, 11 East, 376, n.; 10 R. R. 528; *Mildred* v. *Weaver*, 3 F. & F. 30; 6 L. T. 225; *Vestry of Bermondsey* v. *Brown*, L. R. 1 Eq. 210, 215; *Healey* v. *Batley Corporation*, L. R. 19 Eq. p. 388.

(*c*) *Coats* v. *Herefordshire County Council*, (1909) 2 Ch. 579; 78 L. J. Ch. 568, 781; and see *Att.-Gen.* v. *Chandos Land and Building Society*, (1910) 74 J. P. 401; *East* v. *Berkshire County Council*, (1911) 76 J. P. 35; *Att.-Gen.* v. *Lindsay Hogg*, (1912) W. N. 176; 76 J. P. 450.

upon the question than many acts of enjoyment on the part of the public (*d*). In a case where a highway over a common had, without the authority or interference of the owner of the soil, been diverted by an adjoining proprietor, who substituted for it a new road, which was used by the public for more than twenty years, it was held that there was no dedication of the substituted road, but that the use of it was referable to the right of the public to deviate on to the adjoining land, whenever the owner of the soil stops a highway or suffers it to be foundrous (*e*).

Dedication when presumed from public user of way.

Enjoyment and user of a way by the public is evidence from which the assent of the owner, whoever he is, may be inferred. It is sufficient if there might be a person who was competent to make the dedication. It lies upon the party denying the inference from the user to show that there was no person who had the power of dedicating it at the time the dedication is proved to have taken place (*f*). From evidence of acts of user of a footway by the public, extending over the whole time of living memory, during which, however, the land crossed by the way had been under lease, it was held that the jury might presume against the reversioner a dedication of the way by his ancestors to the public at a period of time anterior to the land having first been leased (*g*). And where settled land was

(*d*) *Marquis of Stafford* v. *Coyney*, 7 B. & C. 257; 5 L. J. (O. S.) K. B. 285; 31 R. R. 186; *Poole* v. *Huskisson*, 11 M. & W. 826; 63 R. R. 782; *Headley* v. *Batley Corporation*, L. R. 19 Eq. p. 388; 44 L. J. Ch. p. 645; *Chinnock* v. *Hartley Wintney Rural Council*, 63 J. P. 327; *Leckhampton Quarries Co.* v. *Ballinger*, (1904) 20 T. L. R. 559; and see *Trafford* v. *St. Faith's Rural Council*, (1910) 74 J. P. p. 298.

(*e*) *Dawes* v. *Hawkins*, 8 C. B. N. S. 848; 29 L. J. C. P. 343.

(*f*) *Reg.* v. *East Mark Tything*, 11 Q. B. 877; 17 L. J. Q. B. 177; 75 R. R. 653; *Reg.* v. *Petrie*, 4 E. & Bl. 738; 24 L. J. Q. B. 167; *Turner* v. *Walsh*, 6 A. C. 636; 50 L. J. P. C. 55; *Vernon* v. *Vestry of St. James*, 16 C. D. 457; 50 L. J. Ch. 81; *Eyre* v. *New Forest Highway Board*, (1892) 56 J. P. 517; *Chinnock* v. *Hartley Wintney Rural Council*, (1899) 63 J. P. 327; *Taff Vale Railway Co.* v. *Pontypridd Urban Council*, (1905) 93 L. T. 126; *Farquhar* v. *Newbury Rural Council*, (1908) 2 Ch. p. 596; (1909) 1 Ch. 12; 78 L. J. Ch. 170; *Coats* v. *Herefordshire County Council*, (1909) 2 Ch. pp. 595, 596; 78 L. J. Ch. 568, 781; and see *Att.-Gen.* v. *Watford Rural Council*, (1912) 1 Ch. 417; 81 L. J. Ch. 281.

(*g*) *Winterbottom* v. *Earl of Derby*, L. R. 2 Ex. 316; 30 L. J. Ex. 194; as to presuming consent of lessor,

under the management of the remainderman in fee, who laid out a road which was used by the public for a period of sixty years, the Court inferred that the tenant for life had knowledge of and acquiesced in the public user, and that there had been a dedication to the public by the tenant for life and remainderman (*h*). So also where there has been long user by the public of a footpath across copyhold land, dedication of the path to the public by the lord as well as by the copyholder will be presumed, unless there is evidence to rebut the presumption (*i*). Where a strip of land which had been set out by an award as a public footpath, had been used for a period of forty years for carts, and regarded by the owner of the soil as a highway for all purposes, the Court would not presume dedication for wheeled traffic, such user having been in its inception and throughout a public nuisance, which no length of time could legalize (*k*).

Amount of user to prove dedication.

It is an unsettled question what length of enjoyment of a way is requisite to raise the presumption of dedication (*l*). The amount of user and enjoyment by the public which is required in order to prove dedication varies according to the nature of the district in which the way is situated; *e.g.*, in a thinly populated or mountainous district slight evidence of user might be sufficient (*m*).

There may be dedication for special uses,

There may be a dedication of land for special uses or for a limited purpose, as for a footway, a horse way, or a drift way (*n*). A dedication may be made subject to the reserva-

see *Simpson* v. *Att.-Gen.*, (1904) A. C. p. 507; 74 L. J. Ch. p. 18; *Corsellis* v. *London County Council*, (1907) 1 Ch. 712, 713; 76 L. J. Ch. 313; on appeal, (1908) 1 Ch. 21; 77 L. J. Ch. 120; *Openshaw* v. *Pickering*, (1913) 77 J. P. 127.

(*h*) *Farquhar* v *Newbury Rural Council*, (1909) 1 Ch. 12; 78 L. J. Ch. 170.

(*i*) *Powers* v. *Bathurst*, 28 W. R. 390; 49 L. J. Ch. 294.

(*k*) *Sheringham Urban Council* v. *Holsey*, (1904) W. N. 83; 91 L. T. 225.

(*l*) See *Rugby Charity* v. *Merryweather*, 11 East. 375; 10 R. R. 528; *Jarvis* v. *Dean*, 3 Bing. 447; 4 L. J. (O. S.) C. P. 144; *Woodyer* v. *Hadden*, 5 Taunt. 125; 14 R. R. 706; *Reg.* v. *Petrie*, 4 E. & Bl. 757; 24 L. J. Q. B. 167; *Att.-Gen.* v. *Biphosphated Guano Co.*, 11 C. D. p. 341; 49 L. J. Ch. p. 73.

(*m*) *Macpherson* v. *Scottish Rights of Way Society*, 13 A. C. 744. See *Att.-Gen.* v. *Watford Rural Council*, (1912) 1 Ch. 417; 81 L. J. Ch. 285.

(*n*) *Poole* v. *Huskisson*, 11 M. & W. p. 830; 63 R. R. 782; *Marquis*

tion of a private right to some extent interfering with the public one (*o*). There may in law be a dedication to the public of a right of way, such as a footpath across a field, subject to the right of the owner of the soil to plough it up, in due course of husbandry, and destroy all trace of it for a time (*p*). But there cannot be a dedication by an owner of his land to the public subject to payment of a toll, except by the authority of the Crown or of a statute (*q*). Nor can there be a valid dedication to a limited class of persons or part of the public, as to a parish. If there be a dedication at all, it must be in favour of the public (*r*). Nor can there be a dedication to the public for a limited time, certain or uncertain. If there be a dedication at all, it must be perpetual (*s*).

subject to private right,

but not to payment of a toll, or to a limited class of persons,

or for a limited time.

A dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things. If there be an erection or excavation existing in the way at the time of the dedication, the owner of the soil is not liable for accidents thereby occasioned. The public must be taken to accept the way, subject to the inconvenience or risk arising from the existing state of things (*t*).

Dedication must be taken to be accepted by the public, subject to inconvenience arising from existing state of things.

of Stafford v. *Coyney*, 7 B. & C. 260; 5 L. J. (O. S.) K. B. 285; 31 R. R. 186; *Att.-Gen.* v. *Horner*, (1913) 2 Ch. p. 180; 82 L. J. Ch. p. 359.

(*o*) *Morant* v. *Chamberlin*, 6 H. & N. 541; 30 L. J. Ex. 299; 123 R. R. 672 (deposit of goods); *Gingell* v. *Stepney Borough Council*, (1908), 1 K. B. 115; 77 L. J. K. B. 347 (exercise of market rights); on appeal as to form of Order, (1909) A. C. 245; 78 L. J. K. B. 673; see *Att.-Gen.* v. *Horner*, *supra*.

(*p*) *Mercer* v. *Woodgate*, L. R. 5 Q. B. 26; 39 L. J. M. C. 21; *Arnold* v. *Blaker*, L. R. 6 Q. B., p. 435; 40 L. J. Q. B. 185; *Rundle* v. *Hearle*, (1898) 2 Q. B. p. 89; 67 L. J. Q. B. 741.

(*q*) *Austerberry* v. *Oldham Corporation*, 29 C. D. 750, 770; 55 L. J. Ch. 638; *Att.-Gen.* v. *Simpson*, (1904) A. C. p. 500; 74 L. J. Ch. p. 15.

(*r*) *Poole* v. *Huskisson*, 11 M. & W. 830; 63 R. R. 782; *Bermondsey Vestry* v. *Brown*, L. R. 1 Eq. 204; *Farquhar* v. *Newbury Rural Council*, (1909) 1 Ch. 12, 16; 78 L. J. Ch. 178. By custom a class of persons, as the inhabitants of a parish, may have a churchway over land, see *Brocklebank* v. *Thompson*, (1903) 2 Ch. 344; 72 L. J. Ch. 626; *Farquhar* v. *Newbury Rural Council*, (1909) 1 Ch. p. 19; 78 L. J. Ch. 170.

(*s*) *Dawes* v. *Hawkins*, 8 C. B. N. S. 848; 29 L. J. C. P. 347. See *Corsellis* v. *London County Council*, (1907) 1 Ch. p. 713; 76 L. J. Ch. 313; (1908) 1 Ch. p. 21; 77 L. J. Ch. 120, as to dedication by a termor.

(*t*) *Fisher* v. *Prowse*, 2 B. & S. p. 780; 31 L. J. Q. B. 212; *Robbins* v. *Jones*, 15 C. B. N. S. 221; 33 L. J. C. P. 1; *Rundle* v. *Hearle*,

Dedication of way along an embankment.

There is nothing inconsistent with the purposes of a sea or river wall, or embankment erected to protect neighbouring lands, in a right of way along the surface; and the same evidence of user will raise a presumption of a dedication of a right of way by the owner of the soil in the case of such an embankment, as in any other case of uninterrupted and open user by the public (*u*).

Highway not an easement.

Ownership of soil of highway.

A public road or highway is not an easement properly so called (*x*). The soil of a highway up to the centre of the road is presumed in law, in the absence of other evidence of ownership, to belong to the owners of the land on each side, subject to the right of passage of the public (*y*). So much of the soil of the surface as may be necessary for the control and maintenance of the road as a highway for public use, is however vested in the local authority (*z*). A conveyance of land, bounded by a highway, is always presumed in law to carry the fee up to the centre of the road, as part and parcel of the grant; unless there be enough in the circumstances or enough in the expressions of the instrument to show a con-

(1898) 2 Q. B. 89; 67 L. J. Q. B. 741; see *Chorley Corporation* v. *Nightingale*, (1906) 2 K. B. pp. 617, 618; 75 L. J. K. B. 793; on appeal, (1907) 2 K. B. 637; 76 L. J. K. B. 1003; *McClelland* v. *Manchester Corporation*, (1912) 1 K. B. p. 129; 81 L. J. K. B. p. 104; *Att.-Gen.* v. *Horner*, (1913) 2 Ch. p. 170; 82 L. J. Ch. p. 359.

(*u*) *Greenwich Board of Works* v. *Maudsley*, L. R. 5 Q. B. 397; 39 L. J. Q. B. 205.

(*x*) *Rangely* v. *Midland Railway Co.*, 3 Ch. p. 310; 37 L. J. Ch. 313.

(*y*) *Smith* v. *Howden*, 14 C. B. N. S. 398; *Leigh* v. *Jack*, 5 Ex. D. p. 273; 49 L. J. Ex. 220; *Beckett* v. *Leeds Corporation*, 7 Ch. 421; *Harrison* v. *Duke of Rutland*, (1893) 1 Q. B. p. 155; 62 L. J. Q. B. p. 124; *Central London Railway Co.* v. *City of London Land Tax Commissioners*, (1911) 2 Ch. pp. 475, 476; (1912), 81 L. J. Ch. p. 27; (1913) A. C. p. 371; 82 L. J. Ch. p. 278.

(*z*) *Mayor of Tunbridge Wells* v. *Baird*, (1896) A. C. p. 442; 65 L. J. Q. B. 451; *Finchley Electric Light Co.* v. *Finchley Urban Council*, (1903) 1 Ch. 437; 72 L. J. Ch. 297; *Poplar Corporation* v. *Milwall Dock Co.* (1904), 68 J. P. 339; *Foley's Charity Trustees* v. *Dudley Corporation*, (1910) 1 K. B. p. 322; 79 L. J. K. B. p. 415; *Caran County Council*, (1910) 2 Ir. 644, 656; *Andrews* v. *Abertillery Urban Council*, (1911) 2 Ch. p. 413; 80 L. J. Ch. p. 741; *Schweder* v. *Worthing Gas Light and Coke Co.*, (1913) 1 Ch. 118; 82 L. J. Ch. 71. As to the vesting of roads and streets, see Public Health Act, 1875, ss. 144—149; Metropolis Management Act, 1855, s. 96; Local Government Act, 1888, s. 11 (6); Public Health (London) Act, 1891, s. 44; and the Development and Road Improvement Funds Act, 1909, s. 9.

trary intention (*a*). This presumption applies to leases as well as to conveyances (*b*), and to streets in a town as well as to highways in the country (*c*), but not to a conveyance of land adjoining a railway (*d*). It seems that if A. owns houses on one side of a street and B. owns houses on the other side, but it turns out that the soil of the highway is not evenly divided between them, A. owning a little more or a little less than half the highway, then when A. conveys his houses describing them as bounded by the highway, that portion of the highway which is vested in A. will by presumption of law, in the absence of circumstances showing a contrary intention, pass to the purchaser (*e*).

Strips of waste adjoining highways.

Strips of waste land between old inclosures and the highway, belong *primâ facie* to the owners of the adjoining inclosures, unless there be something in the circumstances of the case to rebut the presumption (*f*).

Boundaries of highways.

Fences by the side of an ordinary highway are *primâ facie* the boundaries of the highway, so as to raise the presumption that the public right of passage extends over the whole space

(*a*) *Berridge* v. *Ward*, 10 C. B. N. S. 400; 30 L. J. C. P. 218; *Micklethwaite* v. *Newlay Bridge Co.*, 33 Ch. D. p. 145; 55 L. T. 336; *Mellor* v. *Walmesley*, (1905) 2 Ch. p. 179; 74 L. J. Ch. p. 482; see *Central London Railway Co.* v. *City of London Land Tax Commissioners*, (1911) 2 Ch. pp. 473, 474; (1912) 81 L. J. Ch. pp. 26, 27; (1913) A. C. 371, 372; 82 L. J. Ch. 278. As to what is sufficient to rebut the presumption, see *Pryor* v. *Petre*, (1894) 2 Ch. 11; 63 L. J. Ch. 531; *Mappin* v. *Liberty & Co.*, (1903) 1 Ch. p. 128; 72 L. J. Ch. 63; *Central London Railway Co.* v. *City of London Tax Commissioners*, *supra*.

(*b*) *Mappin* v. *Liberty & Co.*, (1903) 1 Ch. p. 127; 72 L. J. Ch. 63.

(*c*) *In re White's Charities*, (1898) 1 Ch. 659; 67 L. J. Ch. 430; and see *London and North Western Railway Co.* v. *Westminster Corporation*, (1902) 1 Ch. p. 279; 71 L. J. Ch. p. 38; *Mappin* v. *Liberty & Co.*, (1903) 1 Ch. p. 126; 72 L. J. Ch. 63; *Central London Railway Co.* v. *City of London Land Tax Commissioners*, (1911) 2 Ch. pp. 473, 474; (1912) 81 L. J. Ch. pp. 26, 27; (1913) A. C. 364; 82 L. J. Ch. 274.

(*d*) *Thompson* v. *Hickman*, (1907) 1 Ch. 550, 556; 76 L. J. Ch. 254.

(*e*) *In re White's Charities*, (1898) 1 Ch. p. 666; 67 L. J. Ch. p. 433.

(*f*) *Doe* v. *Pearsey*, 7 B. & C. 304; 31 R. R. 209; *Grose* v. *West*, 7 Taunt. 39; 17 R. R. 437; *Doe* v. *Hampson*, 4 C. B. 267; 17 L. J. C. P. 225; *Simpson* v. *Dendy*, 8 C. B. N. S. 433; *Curtis* v. *Kesteven County Council*, 45 C. D. 504; 60 L. J. Ch. 103; *Countess of Belmore* v. *Kent County Council*, (1901) 1 Ch. 873; 70 L. J. Ch. 501. See

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of ground between the fences, and not merely to the part which may be metalled (*g*).

Rights of owner of soil of highway.

Being owners of the soil of a highway, the adjacent proprietors have a right to all ordinary remedies for the freehold, and may maintain actions against any person who digs up the soil or cuts down trees growing on the side of the road, or left there for shade or ornament (*h*), or who exceeds the ordinary and reasonable user of the highway (*i*). The freehold and all the profits of the soil belong to the owners of the soil. They may carry water in pipes under the highway, and have every use and remedy that is consistent with the right of passage in favour of the public and the provisions of the Highway Acts and police regulations (*k*). If trees growing by the

East v. *Berkshire County Council*, (1912) 106 L. T. 65; 76 J. P. 35; *Att.-Gen.* v. *Lindsay-Hogg*, (1912) W. N. 176; 76 J. P. 450.

(*g*) *Rex* v. *Wright*, 3 B. & Ad. 681; 1 L. J. (N. S.) M. C. 74; 37 R. R. 520; *Reg.* v. *United Kingdom Electric Telegraph Co.*, 2 B. & S. 647, n.; 31 L. J. M. C. 166; *Locke-King* v. *Woking Urban Council*, (1898) 77 L. T. 790; *Neeld* v. *Hendon Urban Council*, (1899) 81 L. T. 405; *Countess of Belmore* v. *Kent County Council*, (1901) 1 Ch. pp. 877, 878; 70 L. J. Ch. 501; *Harvey* v. *Truro Rural Council*, (1903) 2 Ch. 638; 72 L. J. Ch. 705; *Att.-Gen.* v. *Perry*, (1904) 1 Ir. R 247; *Offin* v. *Rochford Rural Council*, (1906) 1 Ch. 342; 75 L. J. Ch. 348; *Att.-Gen.* v. *Croydon Rural Council*, (1908) 72 J. P. 123. And see *Coats* v. *Herefordshire County Council*, (1909) 2 Ch. 579; 78 L. J. Ch. 568; *Copestake* v. *West Sussex County Council*, (1911) 2 Ch. 331; 80 L. J. Ch. 673; *East* v. *Berkshire County Council*, (1912) 106 L. T. 65; 76 J. P. p. 36; *Att.-Gen.* v. *Lindsay-Hogg*, *supra*; *Tottenham Urban Council* v. *Rowley*, (1912) 2 Ch. p. 646; 82 L. J. Ch. p. 86.

(*h*) *Frompton* v. *Tiffin*, 2 Jur. 986; *Goodson* v. *Richardson*, 9 Ch. 221; 43 L. J. Ch. 790; *Curtis* v. *Kesteven County Council*, 45 C. D. 504; 60 L. J. Ch. 103.

(*i*) See *Harrison* v. *Duke of Rutland*, (1893) 1 Q. B. p. 146; 62 L. J. Q. B. 117; *Hickman* v. *Maisey*, (1900) 1 Q. B. 752; 69 L. J. Q. B. 511; *Fitzhardinge* (*Lord*) v. *Purcell*, (1908) 2 Ch. p. 168; 77 L. J. Ch. p. 546; *Marriott* v. *East Grinstead Gas and Water Co.*, (1909) 1 Ch. 70; 78 L. J. Ch. 141. An injunction will not be granted to restrain trivial acts, *Fielden* v. *Cox*, (1906) 22 T. L. R. 411 (catching moths).

(*k*) 1 Roll. Ab. 392; 2 Inst. 705; *Lade* v. *Shepherd*, Str. 1604; *Goodtitle* v. *Alker*, 1 Burr. 133; *Cunliffe* v. *Whalley*, 13 Beav. p. 416; 88 R. R. 411; *Harrison* v. *Duke of Rutland*, (1893) 1 Q. B. p. 155; 62 L. J. Q. B. 117. See *Att.-Gen.* v. *Ashby*, (1907) 71 J. P. 387; compromised on appeal, (1908) 72 J. P. 449.

side of a carriage way are an obstruction to the highway, the highway authority may order them to be cut (*l*).

Foundrous highway.

If a highway be foundrous and impassable, a right to go over the adjoining land may exist, where the public have from time immemorial been accustomed to deviate; but where there is a limited dedication of a way, the public have no right to deviate, if the way is out of repair (*m*).

Right of access to highway.

The owner of property at the side of a highway has a right of access thereto and any interference with such access is an infringement of his private right. The owner's right, however, to use a portion of the highway for loading and unloading his goods and carrying them into his premises is a right enjoyed by him as one of the public, and is not a private right entitling him to an injunction to restrain the reasonable user by the local authority of their statutory power to erect lamp-posts in the highway, though they may obstruct him in carrying on his business (*n*).

Towing path.

A towing path is a highway to be used only for the purpose of towing barges or vessels (*o*). The owner of the land opposite the towing path is owner of the land over which the towing path passes, unless there is evidence to show that the trustees or conservators of the navigation have acquired a right to the soil. He has every right over that land which is his own other than a right to impede the navigation. The duty of the trustees is to keep the towing path in a fit state for the public use as a towing path, and in a proper case they may have an injunction to restrain the owner of the soil from so

(*l*) See sects. 65, 66 Highway Act, 1835; *Turner* v. *Ringwood Highway Board*, 9 Eq. 418; 21 L. T. 745; *Unwin* v. *Hanson*, (1891) 2 Q. B. 115; 60 L. J. Q. B. 531; *Reynolds* v. *Presteign Urban Council*, (1896) 1 Q. B. 604; 65 L. J. Q. B. 400; *Bullen* v. *Wakely*, 77 L. T. 689.

(*m*) *Arnold* v. *Holbrook*, L. R. 8 Q. B. p. 100; 42 L. J. Q. B. 80; *Eyre* v. *New Forest Highway Board*, 56 J. P. p. 518.

(*n*) *Chaplin* v. *Westminster Corporation*, (1901) 2 Ch. 329; 70 L. J. Ch. 679. As to access to highways over footways, see *Tottenham Urban Council* v. *Rowley*, (1912) 2 Ch. p. 644; 82 L. J. Ch. p. 84. Public Health Acts Amendment Act, 1907, sects. 2 (2), 18.

(*o*) *Winch* v. *Thames Conservators*, L. R. 7 C. P. p. 471; 41 L. J. C. P. p. 249.

using it as to interfere with its use by the public for the purposes of the navigation (*p*).

Nuisance to highway.

The withdrawal of a part of a highway from its ordinary use so as to render the way substantially less commodious to the public is a nuisance to a highway (*q*). It is no answer that the highway authority has consented to the nuisance, or that the public will be benefited thereby (*r*). A county council cannot legally sanction the erection of a permanent structure not authorised by the necessities of the public service upon a county road (*s*). The owner of the land has no right to create an obstruction so as to prevent the public from passing along the side of the highway (*t*). If a part of the highway be inclosed by a private individual, the highway authority may remove the obstruction (*u*). Any member of the public may abate an obstruction to the highway from which he suffers special damage (*x*). But it seems that such right of abatement does not exist where the nuisance is one arising from mere non-feasance; *e.g.* where a bridge has been allowed to fall out of repair (*y*).

Right to abate nuisance.

(*p*) *Lee Conservancy Board* v. *Button*, 12 C. D. 383; 6 A. C. 685; 51 L. J. Ch. 17.

(*q*) *Reg.* v. *United Kingdom Electric Telegraph Co.*, 31 L. J. M. C. 166; 6 L. T. N. S. 378; *Rex* v. *Bartholomew*, (1908) 1 K. B. p. 561; 77 L. J. K. B. p. 280; and see *Campbell* v. *Paddington Corporation*, (1911) 1 K. B. 869; 80 L. J. K. B. 739. As to form of order see *Att.-Gen.* v. *Grays Chalk Quarries Co.*, (1910) 74 J. P. (Jo.) 147, where the defendants had excavated and erected fence across the highway.

(*r*) *Reg.* v. *Train*, 2 B. & S. 640; 31 L. J. M. C. 169; *Reg.* v. *Longton Gas Co.*, 2 El. & El. 651; 29 L. J. M. C. 118; *Preston Corporation* v. *Fullwood Local Board*, (1885) W. N. 213; 34 W. R. 196; *Att.-Gen.* v. *Barker*, (1900) 83 L. T. 245; *Harvey* v. *Truro Rural Council*, (1903) 2 Ch. p. 645; 72 L. J. Ch. p. 708; *Wednesbury Corporation* v. *Lodge Holes Colliery Co.*, (1907) 1 K. B. p. 91; 76 L. J. K. B. p. 72; reversed on other grounds, (1908) A. C. 323; 77 L. J. K. B. 847.

(*s*) *Att.-Gen.* v. *Mayo County Council*, (1902) 1 Ir. R. 13; see *Campbell* v. *Paddington Corporation*, (1911) 1 K. B. 869; 80 L. J. K. B. 739.

(*t*) *Nicoll* v. *Beaumont*, 53 L. J. Ch. 854; and see *Barber* v. *Penley*, (1893) 2 Ch. 447; 62 L. J. Ch. 623; *Att.-Gen.* v. *Brighton Supply Association*, (1900) 1 Ch. 276; 69 L. J. Ch. 204.

(*u*) *Bagshaw* v. *Buxton Local Board*, 1 C. D. 220; 45 L. J. Ch. 200; *Reynolds* v. *Presteign Urban Council*, (1896) 1 Q. B. 604; 65 L. J. Q. B. 400; *Murray* v. *Epsom Local Board*, (1897) 1 Ch. p. 39; 66 L. J. Ch. p. 109.

(*x*) *Campbell Davys* v. *Lloyd*, (1901) 2 Ch. p. 523; 70 L. J. Ch. 714.

(*y*) Ib.

An Urban District Council has power to remove an encroachment upon any highway vested in it by sect. 149 of the Public Health Act, 1875, without first taking proceedings summarily or by indictment against the person alleged to have encroached (*z*).

Action to restrain nuisance.

The Attorney-General can maintain an action to restrain a nuisance to a highway without adducing evidence of actual injury to the public (*a*). But a private person cannot sue to restrain interference with a highway without joining the Attorney-General as a party, except where the interference with the public right is such that some private right of the plaintiff is at the same time infringed, such as his right of access from and to his premises, or where he suffers some special damage beyond the injury to the public (*b*).

Duty of highway authority to maintain highway.

It is the duty of a highway authority to keep its roads in a proper condition to bear the traffic which may reasonably be expected to come upon them (*c*). The obligation to repair

(*z*) *Reynolds* v. *Presteign Urban Council*, (1896) 1 Q. B. 604; 65 L. J. Q. B. 400; *Murray* v. *Epsom Local Board*, (1897) 1 Ch. p. 40; 66 L. J. Ch. 107. As to the power of County Councils to remove obstructions, see Local Government Act, 1888, s. 11 (1); as to District Councils, Local Government, 1894, s. 26; as to the rights of a Parish Council to sue for trespass to the grass on roadside, *Att.-Gen.* v. *Garner*, (1907) 2 K. B. 480; 76 L. J. K. B. 965.

(*a*) *Att.-Gen.* v. *Shrewsbury Bridge Co.*, 21 C. D. 752; 51 L. J. Ch. 746; *London Association of Shipowners v. London and India Docks Committee*, (1892) 3 Ch. p. 270.

(*b*) *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316; *Cook* v. *Bath Corporation*, 6 Eq. 177; *Benjamin* v. *Storr*, L. R. 9 C. P. 400; 43 L. J. C. P. 162; *Att.-Gen.* v. *Barker*, (1900) 83 L. T. p. 248; *Boyce* v. *Paddington Borough Council*, (1903) 1 Ch. p. 114; 72 L. J. Ch. p. 32; *Smith* v. *Wilson*, (1903) 2 Ir. R. 505; *Sheringham Urban Council* v. *Holsey*, (1904) 91 L. T. 225; *Wednesbury Corporation* v. *Lodge Holes Colliery Co.*, (1907) 1 K. B. p. 90; 76 L. J. K. B. p. 72; reversed on other grounds, (1908) A. C. 326; 77 L. J. K. B. 847; *Cavan County Council* v. *Kane*, (1910) 2 Ir. R. p. 656; *Campbell* v. *Paddington Corporation*, (1911) 1 K. B. 869, 874; 80 L. J. K. B. 739, 742; *Lyons & Co.* v. *Capital Syndicate*, (1913) 29 T. L. R. 428 (theatre crowd). So also as to local authorities, *Wallasey Local Board* v. *Gracey*, 36 C. D. 593; 56 L. J. Ch. p. 741; *Tottenham Urban Council* v. *Williamson*, (1896) 2 Q. B. 353; 65 L. J. Q. B. 591; *Sheringham Urban Council* v. *Holsey*, *Cavan County Council* v. *Kane*, *supra*; *Att.-Gen.* v. *Garner*, (1907) 2 K. B. p. 487; 76 L. J. K. B. p. 968.

(*c*) *Att.-Gen.* v. *Scott*, (1905) 2 K. B. p. 166; 74 L. J. K. B. pp. 807,

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and keep in repair will not however be enforced by injunction (*d*).

Traction engines of excessive weight.

A local authority will be restrained by injunction from using steam rollers for the repair of their roads in such a way as to injure the mains and pipes of a gas company properly laid in the highway (*e*).

The use of a traction engine of excessive weight, which causes damage to the highway, is a public nuisance (*f*) which will be restrained by injunction (*g*).

User of highway by landowner in connection with his property.

The right of a landowner to use a public highway for the purpose of bringing materials for building or repairing a house on the land must be exercised reasonably. The public must submit to the inconveniences occasioned necessarily in repairing a house. The question in all cases is whether or not the obstruction of the street is greater than is reasonable in point of time and manner, taking into consideration the interests of all parties, and without unnecessary inconvenience. If there are several ways of access to land, there is no absolute right to use the land in the most convenient way exclusively without regard to the convenience of neighbouring land owners (*h*). In a case of doubt or difficulty the right of the occupier of premises abutting on a highway to make a reasonable use of it for the purpose of loading or unloading goods at his premises, must yield to the public right of unobstructed passage along the highway. It is in each case

808; *Chichester Corporation* v. *Foster*, (1906) 1 K. B. p. 173; 75 L. J. K. B. p. 36; *Att.-Gen.* v. *Sharpness New Docks Co.*, (1913) 1 K. B. pp. 440, 441; 82 L. J. K. B. p. 198.

(*d*) *Att.-Gen.* v. *Staffordshire County Council*, (1905) 1 Ch. 336; 74 L. J. Ch. 153; and see *Reynolds* v. *Barnes*, (1909) 2 Ch. p. 372; 78 L. J. Ch. p. 647; *Rex* v. *Wilts and Berks Canal Co.*, (1912) 3 K. B. 623; 82 L. J. K. B. 5 (mandamus).

(*e*) *Gas Light and Coke Co.* v. *Kensington Vestry*, 15 Q. B. D. 1; 54 L. J. Q. B. 414; see *Chichester Corporation* v. *Foster*, (1906) 1 K. B. p. 167; 75 L. J. K. B. 33; *Att.-Gen.* v. *Sharpness New Docks Co.*, *supra* (injury to bridges).

(*f*) *Chichester Corporation* v. *Foster*, (1906) 1 K. B. 167; 75 L. J. K. B. 33; *Cavan County Council* v. *Kane*, (1910) 2 Ir. R. 644, 656; *ib.*, (1913) 2 Ir. R. 250.

(*g*) *Att.-Gen.* v. *Scott*, (1904) 1 K. B. 404; 73 L. J. K. B. 196; where an interlocutory injunction was granted, but was dissolved at the hearing on the facts, see (1905) 2 K. B. p. 167; 74 L. J. K. B. 807.

(*h*) *Fritz* v. *Hobson*, 14 C. D. 542; 49 L. J. Ch. 321.

a question of degree whether the exercise of this private right of access to premises, which must of necessity involve some obstruction of the highway, is or is not reasonable, and in determining this question regard must be had to all the facts of the case (*i*). In a case in which traders carrying on a large business in Brighton, at premises situate in a street the roadway of which was less than 20 feet wide, kept as many as six vans at once during every alternate hour in the daytime loading and unloading goods at their premises, it was held that this was an unreasonable use of the highway, amounting to a public nuisance, the continuance of which must be restrained by injunction (*k*).

Cattle on highway.

The driving of cattle along a highway is an ordinary use of the highway, and is not actionable. Persons living in houses looking upon a highway, must accept the advantage of having the highway there in return for the inconvenience which may attend upon its existence (*l*).

No length of time justifies a public nuisance.

No length of time can legalise a public nuisance (*m*).

SECTION 8.—NUISANCES TO FERRIES.

ANOTHER class of cases in which the interference of the Court by injunction is sought are nuisances to a ferry. A ferry is a highway for all the King's subjects paying the toll (*n*). It is a franchise which none can set up without a

(*i*) *Att.-Gen.* v. *Brighton, etc., Supply Association*, (1900) 1 Ch. 276; 69 L. J. Ch. 204; *Att.-Gen.* v. *W. H. Smith and Sons*, (1910) 103 L. T. 89; 26 T. L. R. 482.

(*k*) *Att.-Gen.* v. *Brighton, etc., Supply Association, supra*; cf. *Att.-Gen.* v. *W. H. Smith and Sons, supra.*

(*l*) *Truman* v. *London, Brighton, etc., Railway Co.*, 25 C. D. p. 428; 53 L. J. Ch., p. 211, reversed on other points, 11 A. C. 45; 55 L. J. Ch 354. As to whether an owner or occupier of premises is bound to prevent his animals straying on the highway, see *Hadwell* v. *Righton*, (1907) 2 K. B. 345; 76 L. J. K. B. 891; *Higgins* v. *Searle*, (1909) 100 L. T. 280; 25 T. L. R. 301; *Ellis* v. *Banyard*, (1912) 28 T. L. R. 122; *Jones* v. *Lee*, (1912) 28 T. L. R. 92.

(*m*) *Mott* v. *Shoolbred*, 20 Eq. p. 24; *Butterworth* v. *Yorkshire (W. R.) Rivers Board*, (1909) A. C. p. 57; 78 L. J. K. B. p. 208.

(*n*) *North and South Shields Ferry Co.* v. *Barker*, 2 Ex. p. 149; 76 R. R. 531; *Att.-Gen.* v. *Londonderry Bridge Commissioners*, (1903)

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licence from the Crown, and in the case of a ferry by prescription, a Royal grant or licence is presumed (*o*). There may be a franchise of ferry from vill to vill, as well as from highway to highway (*p*). A ferry is wholly unconnected with the ownership or occupation of land (*q*). It is not necessary that the owner of the ferry should have a property in the soil on either side. He must have a right to land upon both sides, but he need not have the property of the soil on either side. It is sufficient if the landing-place be a public highway (*r*). A ferry exists only in respect of persons using the right of way. The right of the grantee of a ferry is the exclusive right of carrying across water from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side (*s*). The owner of a ferry has not however an exclusive right of carrying passengers and goods by any means whatever, but has only a grant of the exclusive right to carry them by means of a ferry (*t*). Accordingly, where a bridge for vehicular and passenger traffic was constructed across a river, sixty yards below the plaintiff's ferry, connecting the same highways as the ferry,

Ferry unconnected with ownership of land.

Nature of the franchise.

1 Ir. R. p. 402; see this case as to right of the officials of the Post Office to be carried free. As to right of owner of a ferry to demand a toll for both entry on and exit from the ferry, see *Robinson* v. *Balmain New Ferry Co.*, (1910) A. C. 295; 79 L. J. P. C. 84.

(*o*) *Huzzey* v. *Field*, 2 Cr. M. & R. p. 440; 4 L. J. (N. S.) Ex. 239; 41 R. R. [illegible]; *Setton* v. *Goodden*, L. R. 2 Eq. 123; 35 L. J. Ch. 427; *Simpson* v. *Att.-Gen.*, (1904) A. C. p. 490; 74 L. J. Ch. p. 9; *Dibdin* v. *Skirrow*, (1907) 1 Ch. p. 441; (1908) 1 Ch. p. 48; 77 L. J. Ch. p. 110.

(*p*) *Tripp* v. *Frank*, 4 T. R. 666; 2 R. R. 495; *Pim* v. *Curell*, 6 M. & W. 234; 55 R. R. 600; *Huzzey* v. *Field*, *supra*; *Newton* v. *Cubitt*, 12 C. B. N. S. p. 58; 13 C. B. N. S. 801; 31 L. J. C. P. 246; *Cowes Urban Council* v. *Southampton, etc., Steam Packet Co.*, (1905) 2 K. B. p. 295; 74 L. J. K. B. p. 668; see *General Estates Co.* v. *Beaver*, (1913) 2 K. B. p. 433; 82 L. J. K. B. 585.

(*q*) *Peter* v. *Kendal*, 6 B. & C. 703, 710; 5 L. J. (O. S.) K. B. 282; 30 R. R. 504; see *Earl of Dysart* v. *Hammerton & Co.*, (1913) W. N. 125; 29 T. L. R. 464.

(*r*) *Peter* v. *Kendal*, *supra*; *Att.-Gen.* v. *Simpson*, (1901) 2 Ch. p. 718; 70 L. J. Ch. p. 842; (1904) A. C. p. 490; 74 L. J. Ch. p. 9.

(*s*) *Huzzey* v. *Field*; *Simpson* v. *Att.-Gen.*, *supra*; *Cowes Urban Council* v. *Southampton, etc., Steam Packet Co.*, (1905) 2 K. B. p. 295; 74 L. J. K. B. p. 669.

(*t*) *Dibdin* v. *Skirrow*, (1907) 1 Ch. 437; 76 L. J. Ch. 268; (1908) 1 Ch. 41; 77 L. J. Ch. 107.

and the public thereupon ceased to use the ferry, it was held that the bridge was not a disturbance of the ferry, and that the ferry owner had no remedy (*u*). The owner of a ferry is under the obligation of always providing proper boats with competent boatmen and all other things necessary for the maintenance of the ferry in an efficient condition for the use of the public, and this obligation is enforceable by indictment and fine (*x*). The neglect to maintain a ferry in proper condition does not *ipso facto* destroy the franchise but renders the grant liable to be annulled by the Crown (*y*).

Obligation to maintain in efficient condition.

If a new ferry is erected on a river, without the King's licence, so near an ancient ferry as to draw away its custom, it is a nuisance to the owner of the ancient ferry (*z*) which will be restrained by injunction (*a*). The owner of the ferry has a cause of action for carrying in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport of passengers using the way, and if the alleged wrongdoer makes a landing-place near to the ferry landing-place, so as to be in substance the same, making no difference to travellers, he would indirectly carry in the line of the owner of the ferry (*b*).

Interference with ferry a nuisance.

(*u*) *Dibdin* v. *Skirrow*, (1907) 1 Ch. p. 437; 76 L. J. Ch. 268; (1908) 1 Ch. 41; 77 L. J. Ch. 107.

(*x*) *Setton* v. *Goodden*, L. R. 2 Eq. p. 131; 35 L. J. Ch. 427; *Att.-Gen.* v. *Simpson*, (1901) 2 Ch. p. 718; 70 L. J. Ch. p. 842; (1904) A. C. p. 490; 74 L. J. Ch. p. 9; *Waterford Bridge Co.* v. *Waterford Corporation*, (1905) 1 Ir. R. p. 328; *Dibdin* v. *Skirrow*, (1907) 1 Ch. p. 444; 76 L. J. Ch. p. 271.

(*y*) *Peter* v. *Kendal*, 6 B. & C. p. 710; 5 L. J. (O. S.) K. B. 282; 30 R. R. 504; *General Estates Co.* v. *Beaver*, (1913) 2 K. B. p. 453; 82 L. J. K. B. p. 592.

(*z*) *Setton* v. *Goodden*, *supra*; *Leamy* v. *Waterford and Limerick Railway Co.*, 7 Ir. C. L. 27; and see *Cowes Urban Council* v. *Southampton, etc., Steam Packet Co.*, (1905) 2 K. B. pp. 297-299; 74 L. J. K. B. pp. 665, 670; *Waterford Bridge Co.* v. *Waterford Corporation*, (1905) 1 Ir. R. pp. 319, 320.

(*a*) See *Cory* v. *Yarmouth and Norwich Railway Co.*, 3 Ha. 593; 64 R. R. 435; *Setton* v. *Goodden*; *Cowes Urban Council* v. *Southampton, etc., Steam Packet Co.*, *supra*; *General Estates Co.* v. *Beaver*, (1913) 2 K. B. 433; 82 L. J. K. B. 585. As to jurisdiction of County Court, see *General Estates Co.* v. *Beaver*, (1912) 2 K. B. 398; 81 L. J. K. B. 761.

(*b*) *Newton* v. *Cubitt*, 12 C. B. N. S. p. 58; 31 L. J. C. P. 246; see *Earl of Dysart* v. *Hammerton & Co.*, (1913) W. N. 125; 29 T. L. R. 464.

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But in considering whether the owner of an ancient ferry has a ground of action against a person who sets up a new ferry in the neighbourhood of the ancient ferry, the interests of the public will be regarded. The area of the monopoly of a ferry will depend on the need of the public for passage. A limit which would be suited to the simple wants of a rude life, where inhabitants are few, is unfitted for large towns, where daily wants are greatly multiplied, and where new conditions are being created by the growing traffic. If the public convenience requires a new passage at such a distance from the old as makes it to be a real convenience to the public, the proximity is not actionable. It is reasonable that if the franchise of a ferry is established for facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances creating new highways on land, would carry with it a right to continue the line of those ways across a water highway (*c*). The owner of an old ferry cannot therefore maintain an action for loss of traffic against a person setting up a new ferry *bonâ fide* for the purpose of accommodating a new and different traffic from that which was accommodated by the old ferry (*d*). The neglect of duty on the part of the owner of a ferry to maintain it in an efficient condition for the use of the public is no answer to an action for disturbance of the ferry though it may render the grant liable to be repealed by the Crown (*e*).

The accommodation of a new and different traffic from that using old ferry not actionable.

Neglect of ferry-owner to maintain efficient ferry.

In an action for disturbance of a ferry, it is sufficient for the plaintiff to prove that he was in possession of the ferry at the

Action for disturbance of ferry.

(*c*) *Newton* v. *Cubitt*, 12 C. B. (N. S.) pp. 58, 59; 13 C. B. (N. S.) 864; 31 L. J. C. P. 246; *Hopkins* v. *Great Northern Railway Co.*, 2 Q. B. D. pp. 231, 232; 46 L. J. Q. B. p. 269; *Cowes Urban Council* v. *Southampton, etc., Steam Packet Co.*, (1905) 2 K. B. p. 297; 74 L. J. K. B. 670; *Dilden* v. *Skirrow*, (1907) 1 Ch. p. 444; 76 L. J. Ch. p. 271; (1908) 1 Ch. p. 44; 77 L. J. Ch. p. 109; *Earl of Dysart* v. *Hammerton & Co.*, (1913) W. N. 125; 29 T. L. R. 464.

(*d*) *Hopkins* v. *Great Northern Railway Co.*; *Cowes Urban Council* v. *Southampton, etc., Steam Packet Co.*; *Earl of Dysart* v. *Hammerton & Co.*, *supra*; *General Estates Co.* v. *Beaver*, (1913) 2 K. B. p. 453; 82 L. J. K. B. p. 592.

(*e*) *Peter* v. *Kendal*, 6 B. & C. 703; 5 L. J. (O. S.) K. B. 282; 30 R. R. 504; *General Estates Co.* v. *Beaver*, *supra*.

time when the cause of action arose. It is not necessary to prove its legal origin by grant or prescription (*f*).

SECTION 9.—NUISANCES TO MARKET.

ANOTHER class of cases in which the interference of the Court by injunction has been sought are nuisances to rights of market.

The right to a market is a franchise and may exist by charter, by prescription, or by Act of Parliament (*g*).

Where, after the grant by the Crown of the rights to a market franchise, the same rights, or larger or different rights of the same nature and character are created in favour of the grantee by statute, the privileges of the ancient franchise are superseded by the statutory rights, and the grantee no longer holds the franchise under his original title, but by virtue of the statute (*h*).

It is not essential to make a right of market good that it should be granted to a person who had actually got the freehold or ever had an interest in the land. The grant of a right of market is a franchise which gives to the person to whom it is granted the right to exercise it if he can. The grant does not confer the right to hold a market on another person's land without his consent. If the owner of the land over which the right of market is exercisable should refuse to convey his land to the grantee of the right of market and should merely

(*f*) *Peter* v. *Kendal*, note (*e*), *supra*.

(*g*) See *De Rutzen* v. *Lloyd*, 5 A. & E. 456; 5 L. J. (N. S.) K. B. 202; 44 R. R. 468; *Penryn Corporation* v. *Best*, 3 Ex. D. 292; 48 L. J. Ex. 193; *Att.-Gen.* v. *Horner*, 11 A. C. 66; 55 L. J. Q. B. 193; *Manchester Corporation* v. *Lyons*, 22 C. D. 287; 47 L. T. 677; *Abergavenny Improvement Commissioners* v. *Straker*, 42 C. D. 83; 58 L. J. Ch. 717; *Haynes* v. *Ford*, (1911) 2 Ch. 237; 80 L. J. Ch. 490; *Att.-Gen.* v. *Horner*, (1913) 2 Ch. 140; 82 L. J. Ch. 339. As to fairs, see *Newcastle (Duke of)* v. *Worksop Urban Council*, (1902) 2 Ch. 145; 71 L. J. Ch. 487.

(*h*) *Manchester Corporation* v. *Peverley*, 22 C. D. 294 (n.); *Manchester Corporation* v. *Lyons*; *Abergavenny Improvement Commissioners*, *supra*; *Birmingham Corporation* v. *Foster*, (1894) 70 L. T. 371; (1894) W. N. 43; *Windsor Corporation* v. *Taylor*, (1899) A. C. pp. 45, 49.

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lease it for the purpose of holding the market, the franchise may be exercised so long as the term continues (*i*).

If the Lord of a Manor proves a market immemorially held in certain places within the manor, it is not a necessary inference that the market was granted to be holden in those places only, but a jury may presume that the market was granted to be holden in any convenient place within the manor (*k*).

Extension of market.

A market granted without metes and bounds may extend from time to time as the exigencies of the market may require (*l*). Thus where a manorial market without metes and bounds had been held from time immemorial in the main street of a borough, and owing to the increase in size of the market it had been for over forty years held without interruption by the highway authority, in certain adjoining streets constructed under Improvement Acts, the Court held that the right to hold the market extended over the new streets when the main street was overcrowded, and that the new streets must be presumed to have been dedicated subject to the exercise of the market franchise (*m*).

Right of grantee to restrain interference with market.

Where a charter conferred the right to hold a market on two specified days in the week, and the market had been held on the remaining days of the week as well, the Court refused to presume a lost grant of the market for the other days (*n*).

The grant of a right of market gives the grantee the right,

(*i*) *Att.-Gen.* v. *Horner*, 11 A. C. p. 80; 55 L. J. Q. B. p. 200; *Gingell & Co.* v. *Stepney Borough Council*, (1908) 1 K. B. p. 129; 77 L. J. K. B. p. 351; (1909) A. C. 245; 78 L. J. K. B. 673 (as to effect of order of C. A.).

(*k*) *De Rutzen* v. *Lloyd*, 4 A. & E. 456; 5 L. J. (N. S.) K. B. 202; 44 R. R. 468; *Curwen* v. *Salkeld*, 3 East, 538; 7 R. R. 510; *Re Islington Market Bill*, 3 Cl. & F. 513, 518; 39 R. R. 32; *Magistrates of Edinburgh* v. *Blackie*, 11 A. C. 665; *Gingell & Co.* v. *Stepney Borough Council*, (1906) 2 K. B. p. 477; 75 L. J. K. B. 777; (1908) 1 K. B. 115; 77 L. J. K. B. 347.

(*l*) *Att.-Gen.* v. *Horner*, 11 A. C. 66; 55 L. J. Q. B. 193; *Gingell & Co.* v. *Stepney Borough Council*, (1906) 2 K. B. p. 481; 75 L. J. K. B. 777; (1908) 1 K. B. p. 128; 77 L. J. K. B. p. 351.

(*m*) *Gingell & Co.* v. *Stepney Borough Council*, (1908) 1 K. B. 115; 77 L. J. K. B. 347.

(*n*) *Att.-Gen.* v. *Horner*, 14 Q. B. D. 245; 54 L. J. Q. B. 227; 11 A. C. 66; 55 L. J. Q. B. 193; see *Att.-Gen.* v. *Horner*, (1913) 2 Ch. 140; 82 L. J. Ch. 339.

if he has done nothing to forfeit or waive the grant (*o*), to hinder other persons from meddling with the franchise. He is entitled to hold the market during market hours, and, it would seem, cannot be interfered with even though an obstruction of the streets which, but for such grant, would amount to a nuisance, be thereby caused (*p*).

The grant of a market does not of itself confer the right to prevent persons from selling on market days in their own shops, though within the town or manor where the market may be held (*q*); but the right may be acquired by immemorial enjoyment or prescription (*r*).

Tolls.

The right to take tolls from buyers is usually but not necessarily a part of the privilege (*s*); and the tolls are due either in respect of goods bought there or for stallage or pickage or the like in respect of stalls or poles fixed in the soil (*t*). It is however essential that the tolls imposed be reasonable in amount; if the tolls exacted are unreasonable, the franchise is illegal and void (*u*).

(*o*) *Great Eastern Railway Co.* v. *Goldsmid*, 25 C. D. p. 536; 53 L. J. Ch. 371; 9 A. C. pp. 936, 937; 54 L. J. Ch. 162; but see *Haynes* v. *Ford*, (1911) 1 Ch. p. 385; 80 L. J. Ch. p. 234, as to waiver by a statutory body of rights vested in it for the public.

(*p*) *Goldsmid* v. *Great Eastern Railway Co.*, 25 C. D. p. 554; 53 L. J. Ch. p. 392; *Att.-Gen.* v. *Horner*, 11 A. C. p. 82; 55 L. J. Q. B. p. 200.

(*q*) *Macclesfield Corporation* v. *Chapman*, 12 M. & W. 18; 13 L. J. Ex. 32; 67 R. R. 240; and see *Haynes* v. *Ford*, (1911) 2 Ch. 237; 80 L. J. Ch. 490.

(*r*) *Mosley* v. *Walker*, 7 B. & C. 40; 5 L. J. (O. S.) K. B. 358; 31 R. R. 146; *Macclesfield Corporation* v. *Chapman*, *supra*; *Penryn Corporation* v. *Best*, 3 Ex. D. p. 295; 48 L. J. Ex. 193, and see *Aberystwenny Improvement Commissioners* v. *Straker*, 42 C. D. 83; 58 L. J. Ch. 717.

(*s*) *Heddy* v. *Wheelhouse*, Cro. Eliz. 558, 592; *Rex* v. *Starkey*, 7 A. & E. p. 106; 6 L. J. (N. S.) K. B. 202; 45 R. R. 678; and see *Newcastle* (*Duke of*) v. *Worksop Urban Council*, (1902) 2 Ch. pp. 156, 157; 71 L. J. Ch. 487; *Woolwich Corporation* v. *Gibson*, (1905) 92 L. T. 538; 21 T. L. R. 421; *Att.-Gen.* v. *Horner*, (1913) 2 Ch. 140, 172; 82 L. J. Ch. 339, 355 (injunction granted restraining the levying of tolls on "sellers" of goods brought to market).

(*t*) 2 Inst. 219; see *Newcastle* (*Duke of*) v. *Worksop Urban Council*, (1902) 2 Ch. pp. 145, 160; 71 L. J. Ch. 487; *Att.-Gen.* v. *Horner*, (1913) 2 Ch. pp. 172, 173; 82 L. J. Ch. p. 355. As to stallage, see *Yarmouth Corporation* v. *Groom*, 1 H. & C. 102; 32 L. J. Ex. 74; *Att.-Gen.* v. *Horner*, *supra*.

(*u*) *Heddy* v. *Wheelhouse*, *supra*; *Lawrence* v. *Hitch*, L. R. 3 Q. B. 521.

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Disturbance of market.

A man who has the franchise can maintain an action against any one who sets up a rival market so as to injure him, though it is not on the same day, provided it is within such a distance as to injure him (*x*).

It is not necessary to constitute disturbance of market that the defendant should claim to have a rival exclusive right of market. There is a disturbance of market where a man sets up a rival place of sale in such a way as to injure and deprive the plaintiff of the benefit of the franchise (*y*). The sale however by a man in his own shop in the regular and ordinary course of business of goods similar in their nature to those sold in the market is not a disturbance of market (*z*). But a man may not under the right to sell marketable articles in his own shop act in such a way as to set up a market in rivalry to the legal one. In order to determine this question all the elements in the case must be taken into consideration, although not one of them might be conclusive upon it (*a*). A man for example who erects a pen for cattle where he collects them and sells them by auction cannot say that he is selling in his own shop (*b*). A sale indeed by auction is not what people generally understand by selling in a shop (*c*). Whether a building is or is not a shop, is a question which must depend upon the circumstances of the case, and also upon the language of special statutes. A building is none the less a shop because the trade carried on therein is wholesale, or because in a sense it is a warehouse by the goods for sale being stored there, or because the goods are sold on commission (*d*).

There is a disturbance of market by intendment of law if a

(*x*) *Jard* v. *Ford*, 2 Saund. 500; *Mosley* v. *Chadwick*, 7 B. & C. 47, n.; *Elwes* v. *Payne*, 12 C. D. 468; 48 L. J. Ch. 831; *Great Eastern Railway Co.* v. *Goldsmid*, 25 C. D. 511, 548; 53 L. J. Ch. 321; 9 A. C. 957; 54 L. J. Ch. 162.

(*y*) *Prince* v. *Lewis*, 5 B. & C. 363; 4 L. J. (O. S.) K. B. 188; 29 R. R. 265; *Brecon Corporation* v. *Edwards*, 31 L. J. Ex. 368; *Great Eastern Railway Co.* v. *Goldsmid*, 9 A. C. 927; 54 L. J. Ch. 162; *Wilcox* v. *Steel*, (1904) 1 Ch. 212; 73 L. J. Ch. 217.

(*z*) *Manchester Corporation* v. *Lyons*, 22 C. D. p. 307; 47 L. T. 677.

(*a*) *Pope* v. *Whalley*, 6 B. & S. p. 311; 34 L. J. M. C. p. 80; *Haynes* v. *Ford*, (1911) 2 Ch. p. 254; 80 L. J. Ch. p. 498.

(*b*) *Fearon* v. *Mitchell*, L. R. 7 Q. B. 690; 41 L. J. Q. B. 341.

(*c*) *Fearon* v. *Mitchell*, *supra*.

(*d*) *Haynes* v. *Ford*, (1911) 2 Ch. p. 249; 80 L. J. Ch. p. 495. As to what is a "shop," see also *Clayton* v. *Le Roy*, (1911) 2 K. B.

rival market is held on the same day; if the rival market is held on a different day, it is only evidence of disturbance for a jury (*e*).

To support an action for disturbance of market, it is not necessary that the defendant should have actually sold: any active interference by him in the conduct of the new market or participation in its profits or risk is sufficient (*f*).

In the case of a mere sale outside a market the question whether the seller intended to evade the market tolls is of importance in deciding whether there has been a disturbance of the market or not, but where the sale amounts to setting up a rival market, the question of the defendant's intention is no longer relevant or important (*g*). Where a defendant held an auction sale of ponies in a field near a horse and cattle market, partly owing to the accommodation at the market being unsuitable for his ponies, but disclaimed any intention of setting up a rival market, and at the trial of the action offered an undertaking not to again infringe the plaintiff's rights, the Court being satisfied that the defendant would not repeat his wrongful act made a declaration that the defendant's act constituted a disturbance of the plaintiff's market and gave the plaintiff liberty to apply for an injunction if necessary (*h*).

Insufficient accommodation in market not a defence to action for disturbance.

Failure on the part of the lord of the market to afford sufficient accommodation for the public is not a defence to an action for disturbance by the setting up of a rival place of sale. Nor is the fact that the market may be so occupied and so used that if more people than actually came to it wished to do so, they would find difficulty in getting in, an excuse for setting up a rival market (*i*). Nor is the fact that the lord of the market did not maintain the market in good and sufficient

p. 1043; (1912) 81 L. J. K. B. p. 56, and as to sale by an agent contrary to his principal's directions, *Wake* v. *Dyer*, (1911) 104 L. T. 448.

(*e*) *Dorchester Corporation* v. *Ensor*, L. R. 4 Ex. 335; 39 L. J. Ch. 11; *Downshire* (*Marquis*) v. *O'Brien*, 19 L. R. Ir. 380. See *Wilcox* v. *Steel*, (1904) 1 Ch. 212, 218; 73 L. J. Ch. 217.

(*f*) *Dorchester Corporation* v. *Ensor*, *supra*.

(*g*) *Wilcox* v. *Steel*, (1904) 1 Ch. p. 221; 73 L. J. Ch. p. 221.

(*h*) Ib.

(*i*) *Great Eastern Railway Co.* v. *Goldsmid*, 25 C. D. 511; 53 L. J. Ch. 371; 9 A. C. 927; 54 L. J. Ch. 162; *Wilcox* v. *Steel*, (1904) 1 Ch. pp 224, 225; 73 L. J. Ch. p. 221.

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order a bar to an action for disturbance of market; but if it be the fact that it did prevent the defendant from using the market, that may disprove the allegation that he had disturbed the market by selling outside, inasmuch as he could not have sold in the market and was prevented from doing so (*k*).

Statutory remedy does not exclude an injunction.

The fact that there may be a statutory remedy does not exclude the remedy by injunction unless the statute expressly or by necessary implication excludes that remedy, and the Court will not infer this intention from a provision for the purpose of protecting the right (*l*).

Persons alleging statutory rights in a market, and claiming an injunction and account, may bring a representative action if the relief sought is beneficial to all whom the plaintiffs represent. The rule is not limited to persons having a beneficial proprietary interest, nor need the nominal plaintiffs have been wronged in their individual capacity. The Attorney-General is not a necessary party to such an action (*m*).

Power of local authority to provide market.

An urban authority has statutory power, under certain conditions, to provide a market within its district, and to take stallages, rents, and tolls, in respect of the use by any person of such market, but no market can be established under the statute, so as to interfere with any rights, powers, or privileges enjoyed within the district by any person adversely to the rest of the world and peculiar to himself, without his consent (*n*).

SECTION 10.—NUISANCES CONNECTED WITH TRADE DISPUTES.

Combinations of workmen at common law.

At common law a conspiracy or combination of workmen to raise wages was legal (*o*); although there are dicta to the

(*k*) Ib.

(*l*) *Stevens* v. *Chown*, (1901) 1 Ch. 894; 70 L. J. Ch. 571; and see *Birmingham Corporation*, (1894) 70 L. T. p. 371, and *ante*, p. 9.

(*m*) *Bedford* (*Duke of*) v. *Ellis*, (1901) A. C. p. 12; 70 L. J Ch. p. 107.

(*n*) Public Health Act, 1875, s. 166. See s. 167, which incorporates the provisions of the Markets and Fairs Clauses Act, 1847, as to markets; *Woolwich Corporation* v. *Gibson*, (1905) 92 L. T. 538; 21 T. L. R. 421. See also 8 Edw. 7, c. 6, as to the powers of a rural district council to create a market with the consent of the Local Government Board.

(*o*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, (1892) A. C. p. 47; 61 L. J. Q. B. p. 304; *Gozney* v. *Bristol Trade and Provident Society*, (1909) 1 K. B. p. 922; 78 L. J. K. B. p. 623.

contrary (*p*): various statutes, however, were passed prior to 1824 expressly prohibiting combinations or conspiracies on the part of workmen to raise their wages or shorten their hours of labour (*q*).

By an Act passed in the year 1824 (*r*) the laws relating to the combination of workmen were repealed. In the following year this Act was itself repealed and the common law of conspiracy was restored (with certain exceptions in favour of meetings to discuss the rate of wages or hours of work), and penalties were imposed for intimidation, molestation and obstruction (*s*).

Doubts having arisen as to the meaning of the words "molestation" or "obstruction," in the latter Act, it was declared by an Act of the year 1859 that workmen who merely endeavoured peaceably and without threats or intimidation to persuade others to abstain from work in order to obtain a certain rate of wages or altered hours of work should not be deemed guilty of molestation within the meaning of the Act (*t*). And by a later Act (*u*) it was provided that a person should be deemed to molest or obstruct another person if he should persistently follow about such person, or if he should hide such person's tools or other property, or if he should deprive him of or hinder him in the use thereof, or if he should watch or beset the house or other place where such person should reside or work, or carry on business, or the approach to such house or place, or if he should with two or more persons follow such person in a disorderly manner in any street or road.

Criminal Law Amendment (Violence, etc.) Act, 1871.

The Trade Union Act, 1871 (*x*), provides that the purposes of any trade union shall not, *by reason merely that they are in restraint of trade*, be deemed unlawful so as to render any member liable to prosecution for conspiracy, or so as to render void or voidable any agreement or trust.

Trade Union Act, 1871.

(*p*) See *Hilton* v. *Eckersley*, 8 E. & B. 47; 25 L. J. Q. B. 199; *Walsby* v. *Anley*, 30 L. J. M. C. 121; *Lyons* v. *Wilkins*, (1896) 1 Ch. p. 828; 65 L. J. Ch. p. 601.

(*q*) *Larkin* v. *Belfast Harbour Commissioners*, (1908) 2 Ir. pp. 221, 222. See 5 Geo. 4, c. 95, and 6 Geo. 4, c. 129, where the old Acts are set out.

(*r*) 5 Geo. 4, c. 95.

(*s*) 6 Geo. 4, c. 129, repealed by 34 & 35 Vict. c. 32.

(*t*) 22 Vict. c. 34 (repealed by 34 & 35 Vict. c. 32).

(*u*) 34 & 35 Vict. c. 32, s. 1.

(*x*) 34 & 35 Vict. c. 31, ss. 2, 3.

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The Act provides for the registration of trade unions (*y*), and enables such registered trade union to hold a limited amount of land and to deal with the same (*z*), and vests all the real and personal estate of such a trade union in its trustees (*a*). The Act enables the trustees of such a trade union, if authorised by its rules, to bring or defend proceedings concerning the property of the trade union (*b*).

Statutory definitions of Trades Union.

By the Trade Union Amendment Act, 1876, a trade union is defined as any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the Trade Union Act of 1871 had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade (*c*). By the Trade Union Act, 1913, sect. 2, sub-sect. 1, a trade union is defined for the purposes of the Acts, 1871 to 1913, as any combination, whether temporary or permanent, the principal objects of which are under its constitution statutory objects, and the section provides that any combination which is for the time being registered as a trade union is to be deemed to be a trade union so long as it is so registered.

Conspiracy and Protection of Property Act, 1875, and Trade Disputes Act, 1906.

The Conspiracy and Protection of Property Act, 1875 (*d*), as amended by the Trade Disputes Act, 1906 (*e*), provides that an agreement or combination by two or more persons to do, or procure to be done, any act "in contemplation or furtherance of a trade dispute," shall not be indictable as a conspiracy, if such act, if committed by one person, would not be punishable as a crime, and an act done in pursuance of an agreement or combination by two or more persons shall, if done

(*y*) 34 & 35 Vict. c. 31, sects. 6, 13.

(*z*) Ib., sect. 7.

(*a*) Ib., sect. 8, and see the Trade Union Act Amendment Act, 1876, 39 & 40 Vict. c. 22, ss. 3, 4.

(*b*) Section 9; see the Trade Disputes Act, 1906, s. 4, sub-s. 2.

(*c*) 39 & 40 Vict. c. 22, s. 16, amending sect. 23 of 34 & 35 Vict. c. 31; and see the proviso to the last mentioned Act, and sect. 5, sub-s. 2, of the Act of 1906 as to a branch of a trade union.

(*d*) 38 & 39 Vict. c. 86, s. 3 This Act does not apply to seamen; see sect. 16.

(*e*) 6 Edw. 7, c. 47, s. 5, sub-s. 3.

"in contemplation or furtherance of a trade dispute," not be actionable unless the act, if done without such agreement or combination, would be actionable (*f*).

Meaning of trade dispute.

The expression "Trade Dispute" in the Acts of 1875 and 1906 means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour of any person, and the expression "workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises (*g*). The words "an act done in contemplation or furtherance of a trade dispute" mean that either a dispute is imminent and the act is done in expectation and with a view to it or that the dispute is already existing and the act is done in support of one side to it; in either case the act must be genuinely done, as described, and the dispute must be a real thing imminent or existing, whether a trade dispute is actually impending or probable is a question of fact in each case (*h*).

Workmen.

Act in contemplation or furtherance of a trade dispute.

Intimidation and picketing.

Every person, however, who with a view to compel any other person to abstain from doing or to do any act which such person has a legal right to do or abstain from doing, wrongfully and without legal authority uses violence to or intimidates (*i*) such other person or his wife or children, or injures his property; *or* persistently follows such other person about from place to place (*k*); or hides any tools, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or, watches or besets (*l*) the house (*m*) or other place where such other person resides, or works, or carries on business, or happens to be, or the ap-

(*f*) 6 Edw. 7, c. 47, s. 1.

(*g*) Ib., sect. 5, sub-s. 3; *Dallimore* v. *Williams* (1913), 29 T. L. R. 67.

(*h*) *Conway* v. *Wade*, (1909) A. C. p. 512; 78 L. J. K. B. p. 1028. See *Dallimore* v. *Williams*, *supra*.

(*i*) See *Curran* v. *Treleaven*, (1891) 2 Q. B. 560; 61 L. J. M. C. 12; *Rex* v. *Baker* (1911), 7 Cr. App. R. 89; *Young* v. *Peck* (1913), 29 T. L. R. 31.

(*k*) See *Smith* v. *Thomasson*, 62 L. T. 68; 54 J. P. 596; *Rex* v. *Wall*, (1907) 21 Cox, C. C. 401; *Wilson* v. *Renton*, (1910) S. C. 32.

(*l*) *Rex* v. *Wall*, *supra*; *Toppin* v. *Feron*, (1909) 43 Ir. L. T. 190.

(*m*) *Rex* v. *Wall*, *supra*.

proach to such house or place; or follows such other person with two or more persons in a disorderly manner in or through any street or road; shall be liable on conviction to a penalty or imprisonment (*n*). But it is lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm "in contemplation or furtherance of a trade dispute," to "attend" (*o*) at (*p*) or near a house or place where a person resides or works, or carries on business, or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working (*q*). The Trade Disputes Act, 1908, in legalising peaceful picketing "at or near" a house, does not, however, confer a right to enter upon private property against the will of the owner (*r*).

The above statutes clearly recognise the legality of strikes and picketing up to a certain point; but it is still illegal to use force or threats of violence to prevent others from working on such terms as they think proper (*s*).

Watching and besetting.

Watching or besetting a place where a person "resides or works or carries on business or happens to be" within the meaning of the Conspiracy and Protection of Property Act, 1875 (*t*), does not necessarily imply any lengthened watching,

(*n*) 38 & 39 Vict. c. 86, s. 7.

(*o*) *Rex* v. *Wall*, *supra*.

(*p*) See *Larkin* v. *Belfast Harbour Commissioners*, (1908) 2 Ir. R. 214.

(*q*) 6 Edw. 7, c. 47, s. 2, sub-ss. 1, 2, repealing sect. 7 of the Act of 1875 from "attending at or near" to the end of the section; see *Toppin* v. *Feron*, note (*l*), *supra*.

(*r*) *Larkin* v. *Belfast Harbour Commissioners*, *supra*.

(*s*) *Farrer* v. *Close*, L. R. 4 Q. B. p. 612; 38 L. J. M. C. p. 139; *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, (1892) A. C. p. 47; 61 L. J. Q. B. p. 304; *Quinn* v. *Leathem*, (1901) A. C. 495, 541; 70 L. J. P. C. 76; *Denaby and Cadeby Main Collieries Co.* v. *Yorkshire Miners Association*, (1906) A. C. p. 400; 75 L. J. K. B. p. 966; *Ward, Lock & Co.* v. *Operative Printers' Assistants Society*, (1906) 22 T. L. R. 327; *Gozney* v. *Bristol Trade and Provident Society*, (1909) 1 K. B. pp. 916, 922; 78 L. J. K. B. p. 624; *Russell* v. *Amalgamated Society of Carpenters and Joiners*, (1910) 1 K. B. p. 525; 79 L. J. K. B. p. 515; affirmed, H. L. (1912) 81 L. J. Ch. 619; A. C. p. 435; *Mudd* v. *General Union of Operative Carpenters and Joiners*, (1910) 26 T. L. R. p. 519; 103 L. T. p. 46; and see *Sanken* v. *Busnach*, (1912) 29 T. L. R. 214; *Vacher* v. *London Society of Compositors*, (1913) A. C. p. 114; 82 L. J. K. B. p. 235.

(*t*) 38 & 39 Vict. c. 86, s. 7, sub-s. 4.

and is not limited to places habitually frequented by the workmen thus picketed (*u*).

Interference with a man in the carrying on of his trade.

A person has the right, at common law, in all matters not contrary to law, to regulate his own mode of carrying on his business or trade, and any invasion of this right is a legal wrong (*x*). It is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference (*y*). The circumstances which will constitute sufficient justification cannot be satisfactorily defined, and must be left to the determination of the Court in each case in which the question arises (*z*). It has also been laid down that a combination of two or more persons without justification to injure an employer in his business or trade, by inducing his customers or servants to break their contracts with him, or not to deal with him, or not to continue in his employment, or a combination to injure a workman by inducing employers not to employ him, or continue him in their employment, is, if it results in damage to such employer, or workman, actionable (*a*). But now by the Trade Disputes Act, 1906 (*b*), an act done by a person "in contemplation or

(*u*) *Charnock* v. *Court*, (1899) 2 Ch. 35; 68 L. J. Ch. 550; *Walters* v. *Green*, (1899) 2 Ch. 696; 68 L. J. Ch. 730.

(*x*) *Rex* v. *Barr*, 6 C. & P. 329; *Lumley* v. *Gye*, 2 E. & B. 216; *Hilton* v. *Eckersley*, 6 El. & Bl. 74; *Allen* v. *Flood*, (1898) A. C. p. 92; 67 L. J. Q. B. p. 168; *Quinn* v. *Leathem*, (1901) A. C. p. 526; 70 L. J. P. C. p. 89; *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, (1903) 2 K. B. p. 573; 72 L. J. K. B. p. 903; affirmed *sub nom. South Wales Miners' Federation* v. *Glamorgan Coal Co.*, (1905) A.C. pp. 251, 253; 74 L. J. K. B. 525.

(*y*) *Quinn* v. *Leathem*, (1901) A. C. p. 510; 70 L. J. P. C. p. 83; see *National Phonograph Co.* v. *Edison Bell Consolidated Phonograph Co.*, (1908) 1 Ch. p. 359, 77 L. J. Ch. p. 223.

(*z*) *Glamorgan Co.* v. *South Wales Miners' Federation*, (1903) 2 K. B. 545; 72 L. J. K. B. p. 903; in H. L., (1905) A. C. 239; 74 L. J. K. B. 525; *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, (1903) 2 K. B. p. 618; 72 L. J. K. B. p. 913.

(*a*) *Quinn* v. *Leathem*, (1901) A. C. 495, 510; 70 L. J. P. C. 89; *Read* v. *Friendly Society of Operative Stonemasons*, (1902) 2 K. B. 88, 96, 752; 71 L. J. K. B. p. 994; *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, (1903) 2 K. B. 600; 72 L. J. K. B. p. 913; *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, (1905) A. C. pp. 251. 253; 74 L. J. K. B. 525; *Conway* v. *Wade*, (1909) A. C. 506, 510; 78 L. J. K. B. p. 1027.

(*b*) 6 Edw. 7, c. 47, s. 3. As to the meaning of the expression "in contemplation or furtherance of a trade dispute," see *supra*, p. 323.

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furtherance of a trade dispute" is not actionable on the ground "only" that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.

If there be threats or violence, the Act of 1906 gives no protection, for then there is some other ground of action beside the ground that it "induces some other person to break a contract;" so far the law is not changed. If the inducement be to break a contract without threat or violence then this is no longer actionable, provided that it was done "in contemplation or furtherance of a trade dispute." If there be no threat or violence and no breach of contract, and yet there is "an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills," there again there is perhaps a change. It is not to be actionable, provided it was done "in contemplation or furtherance of a trade dispute" (*c*).

Liability of trade union for torts of its agents before and since the Trade Disputes Act, 1906.

Before the Trade Disputes Act, 1906 (*d*), a trade union could be sued for the tortious acts of its agents acting within the scope of their authority (*e*). Sect. 4 (1) of this Act, however, provides, that an action shall not be entertained by any Court against a trade union whether of workmen or masters or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union; but nothing in the section is to affect the liability of the trustees of a trade union to be sued in the events provided by the Trade Union Act, 1871,

Liability of trustees of trade union.

(*c*) *Conway* v. *Wade*, (1909) A. C. pp. 511, 512; 78 L. J. K. B. p. 1028, per Lord Loreburn, L.C.; see *Haskell* v. *Lancashire and Cheshire Miners' Federation*, (1912) 28 T. L. R. 519.

(*d*) 6 Edw. 7, c. 47. The Act is not retrospective: *Smithies* v. *National Association of Operative Plasterers*, (1909) 1 K. B. 310; 78 L. J. K. B. 259.

(*e*) *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*, (1901) A. C. pp. 426, 443; 70 L. J. K. B. pp. 905, 913; and see *Trollope* v. *London Building Trades Federation*, 72 L. T. 342; *Yorkshire Miners' Association*, (1905) A. C. p. 280; 74 L. J. K. B. p. 523; *Vacher* v. *London Society of*

sect. 9 (*f*), except in respect of any tortious act committed by or on behalf of the union "in contemplation or in furtherance of a trade dispute" (*g*).

Accordingly, where non-union men brought an action for damages and an injunction against a trade union and its secretary for inducing the plaintiffs' employers to cease to employ the plaintiffs, the action was dismissed, on the ground that there being a trade dispute, the union was protected by sect. 4 (1), and its secretary by sect. 3 of the Act of 1906 (*h*).

The protection afforded to a trade union by the Act of 1906 is not taken away by the fact that the rules of such union authorise the application of its funds for political purposes (*i*), which was held in *Osborne* v. *Amalgamated Society of Railway Servants* to be *ultra vires* and illegal (*k*).

Sub-sect. 1 of sect. 4 prohibits all actions of tort against a trade union and not merely actions in respect of tortious acts committed by or on behalf of a trade union "in contemplation or furtherance of a trade dispute" (*l*).

Liability of officials of trade union.

The sub-section does not, however, confer immunity upon a member or official of a trade union personally, but only prevents him being sued on behalf of himself and other members of the trade union in such a way as to make the trade union and its funds liable (*m*).

Compositors, (1913) A. C. p. 113; 82 L. J. K. B. 232. A registered trade union may be sued in its registered name, and an unregistered trade union in a representative action: *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants, supra*; *Russell* v. *Amalgamated Society of Carpenters*, (1912) A. C. 438; 81 L. J. K. B. 619; *Parr* v. *Lanc. and Cheshire Miners' Federation*, (1913) 1 Ch. 375; 82 L. J. Ch. 193.

(*f*) I.e., concerning the property of a trade union.

(*g*) 6 Edw. 7, c. 47, s. 4, sub-s. 2. See *Vacher* v. *London Society of Compositors*, (1913) A. C. 115, 119; 82 L. J. K. B. 232.

(*h*) *Gaskell* v. *Lancashire and Cheshire Miners' Federation*, (1912) 28 T. L. R. 518.

(*i*) Ib.

(*k*) (1910) A. C. 87; 79 L. J. Ch. 87; *Wilson* v. *Scottish Typographical Association*, (1912) S. C. 534. See now the Trade Union Act, 1913, *post*, Chap. XIX.

(*l*) *Bussy* v. *Amalgamated Society of Railway Servants*, (1908) 24 T. L. R. 437; *Vacher* v. *London Society of Compositors*, (1913) A. C. 107; 82 L. J. K. B. 232; *Shinwell* v. *National Sailors' and Firemen's Union*, (1913) 2 S. L. T. 83.

(*m*) *Bussy* v. *Amalgamated Society of Railway Servants*; *Shinwell* v. *National Sailors' and Firemen's Union*, *supra*.

CHAPTER VII.

INJUNCTIONS TO RESTRAIN THE INFRINGEMENT OF PATENTS.

SECTION 1.—PRINCIPLES ON WHICH THE COURT RESTRAINS THE INFRINGEMENT OF PATENTS.

THE jurisdiction of the Court in restraining by interlocutory injunction the infringement of patent rights, is in aid of the legal right. The Court proceeds on the assumption that the person who makes the application has the legal right which he asserts, but needs the aid of the Court for the purpose of protecting his property from damage pending the trial of the legal right (*a*).

It seems to have been formerly the opinion that a Court of equity would not interfere by injunction to protect a patent right, until the right had been established at law. Gradually, however, the Court of Chancery abandoned this position (*b*), and since the Judicature Act the question has ceased to be one of practical importance.

But the reluctance of the Court of Chancery to interfere in cases of disputed patent right had its justification in reason as well as in the maxim of equity. We find accordingly that, while asserting its right to act independently of references to law, the Court of Chancery still continued to display its original caution in granting injunctions (*c*).

Under the Patents and Designs Act, 1907 (*d*), a patentee cannot take proceedings in respect of infringements committed before the publication of his complete specification and until letters patent have actually been granted to him (*e*); and if any proceeding be taken in respect of an infringement

(*a*) *Baron* v. *Jones*, 4 M. & C. 436; 48 R. R. 143; *Proctor* v. *Bayley*, 42 C. D. p. 398; 59 L. J. Ch. p. 13.

(*b*) *Oxford and Cambridge Universities* v. *Richardson*, 6 Ves. 689 See now 7 Edw. 7, c. 29, s. 34.

(*c*) See *post*, p. 343.

(*d*) 7 Edw. 7, c. 29.

(*e*) Sections 10 and 13.

committed after a failure to pay any fee within the prescribed time, the Court may refuse to award damages in respect of such infringement (*f*).

Patent infringed by several persons at the same time.

A patentee has frequently to consider how he ought to act when his patent is being infringed by several persons at the same time. A way out of the difficulties which such a case presents was suggested by Wood, V.-C., in *Bovill* v. *Crate* (*g*). "After getting information of case after case of infringement, the patentee might select that which he thought the best in order to try the question fairly, and proceed in that case to obtain his interlocutory injunction. He might write at the same time to all the others who were *in simili casu* and say to them, Are you willing to take this as a notice to you that the present case is to determine yours? Otherwise I shall proceed against you by way of interlocutory injunction; and if you do not object on the ground of delay, I do not mean to file bills against all of you at once."

Notice of action.

A plaintiff is entitled to apply for an injunction as soon as his legal right is invaded, although unintentionally; and he is, as a general rule, under no obligation to give the defendant any notice before commencing an action (*h*), or to discontinue proceedings on the defendant admitting and promising not to repeat the infringement (*i*).

Parties to proceedings.

Where an account is claimed, all persons claiming any interest, legal or equitable, in the patent, ought to be made parties to the action, so that the infringing defendants may not be called upon to account twice. But where only an injunction and delivery up of infringing articles are claimed, one of several owners has a right to sue alone (*k*).

(*f*) Section 17, sub-s. 3.

(*g*) 1 Eq. p. 391. This course was approved and the effect of it explained in *North British Rubber Co.* v. *Gormully Co.*, 12 R. P. C. p. 21.

(*h*) *Upmann* v. *Forester*, 24 C. D. p. 235; 52 L. J. Ch. 946; *Weingarten* v. *Bayer*, (1905) 92 L. T. p. 513; 22 R. P. C. p. 350. But see *Spaul* v. *Monopole Cycle Co.*, (1906) 23 R. P. C. 647; *Burberrys* v. *Watkinson*, (1906) 23 R. P. C. 141, as to costs.

(*i*) *Losh* v. *Hague*, 1 W. P. C. p. 200; *Upmann* v. *Forester*, 24 C. D. 231, 235; 52 L. J. Ch. 946; *Proctor* v. *Bennis*, 36 C. D. p. 760; 57 L. J. Ch. p. 22; but see as to costs *Spaul* v. *Monopole Cycle Co.*, *supra*, and *post*, Sect. 5.

(*k*) *Bergmann* v. *Macmillan*, 17 C. D. 423; 44 L. T. 794.

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Where a patent has been mortgaged, the mortgagor may sue alone without joining his mortgagee as a party (*l*).

Mortgagor and mortgagee. Part owner.

So also if an invention can be severed into distinct portions the owner of one part may sue for infringement of that part (*m*).

Licensee.

It seems that a mere licensee of a patent is not a person having an interest in the patent; he is only a person permitted to use the invention, and therefore he cannot sue for infringement without joining the patentee, even where his licence is exclusive (*n*). But an exclusive licensee may maintain an action against his licensor where the latter acts in breach of the licence so given (*o*).

Agent for sale.

A mere agent for sale cannot bring the action; whether a person is a mere agent or not depends upon the facts (*p*).

Assignee.

A legal assignee of a patent may sue for its infringement (*q*), but before doing so, should complete his title by registration (*r*). An equitable assignee cannot sue without bringing the legal owner of the patent before the Court (*s*).

Trustee in bankruptcy. Trustee for creditors patentee on register.

The action may also be brought by the assignee or trustee of a bankrupt (*t*). In a recent case (*u*), a patentee who had assigned all his property, including his letters patent, to a trustee for his creditors, was held entitled to sue for infringement notwithstanding that the trustee was not a party to the

(*l*) *Van Gelder* v. *Sowerby*, 44 C. D. 374; 59 L. J. Ch. 583.

(*m*) *Cannicliff* v. *Mallet*, 7 C. B. N. S. 209; 29 L. J. C. P. 70; 121 R. R. 463.

(*n*) *Heap* v. *Hartley*, 42 C. D. 461; 58 L. J. Ch. 790; but see *Renard* v. *Levinstein*, 2 H. & M. 628, 631; *Cochrane & Co.* v. *Martin*, (1911) 28 R. P. C. 284 (Sc.).

(*o*) *Guyot* v. *Thompson*, (1894) 3 Ch. 388; 64 L. J. Ch. 32.

(*p*) *Adams* v. *North British Railway Co.*, 29 L. T. 367.

(*q*) *Electric Telegraph Co.* v. *Brett*, 10 C. B. 838; 20 L. J. C. P. 123; 84 R. R. 802.

(*r*) *Chollet* v. *Hoffman*, 7 E. & B. 686; 26 L. J. Q. B. 249; 110 R. R. 785. See 7 Edw. 7, c. 29, s. 71, sub-s. 3.

(*s*) *Bowden's Patents Syndicate* v. *Smith*, (1904) 2 Ch. 86, 122; 73 L. J. Ch. 522, 525; and see *Spennymoor Foundry Co.* v. *Catherall*, (1909) 26 R. P. C. 822. Cf. *Actien Gesellschaft Industrie* v. *Temler*, 16 R. P. C. 447, explained in *Bowden's Patents Syndicate* v. *Smith*.

(*t*) *Bloxam* v. *Elsee*, 6 B. & C. 169; 3 L. J. (O. S.) K. B. 93; 30 R. R. 275.

(*u*) *Duncan* v. *Lockerbie and Williamson*, (1912) 56 S. J. 573; 29 R. P. C. 459.

action, by virtue of the rights conferred upon the patentee as registered proprietor of the patent (*x*).

Joint tenants of patent.

Where a patent has been granted to two persons jointly before the 1st of January, 1908, and one of them dies, the patent passes by survivorship, unless there has been a severance of the joint estate (*y*).

Tenants in common.

Where a patent was assigned to two persons as tenants in common, and one died, it was held that actions for infringement committed before his death survived to the other, who was entitled at law to recover the whole damages (*z*).

Patents and Designs Act, 1907, s. 37.

But now, by the Patents and Designs Act, 1907, where, after the commencement of this Act, a patent is granted to two or more persons jointly, they shall, unless otherwise specified in the patent, be treated for the purpose of the devolution of the legal interests therein as joint tenants, and if any such person dies, his beneficial interest in the patent shall devolve on his personal representatives as part of his personal estate (*a*).

Defendants.

Any person who infringes or takes part in an infringement may be made defendant. Thus where the infringement occurs in the course of work done under a contract, the contractor who carries out the work, and not the architect who indicates what is to be done, is the person who ought to be sued (*b*).

Contractors.

Custom House.

Custom House agents who arrange for the storing and transhipment in an English port of an article which infringes an English patent do not thereby make themselves liable as infringers (*c*).

Carriers.

But carriers who bring infringing articles into England are liable, and may be restrained by injunction (*d*).

Seller of materials to make infringing article.

A person who merely prepares the materials from which the infringing article is made (*e*), or who merely makes

(*x*) See 7 Edw. 7, c. 29, s. 71, sub-s. 3.

(*y*) *National Company* v. *Gibbs*, (1899) 2 Ch 289; 68 L. J. Ch. 503; reversed on other grounds, (1900) 2 Ch. 280; 69 L. J. Ch. 457.

(*z*) *Smith* v. *London and North Western Railway Company*, 2 El. & Bl. 69.

(*a*) 7 Edw. 7, c. 29, s. 37, and see Patent Rules, 1908, r. 51.

(*b*) *Denley* v. *Blore*, 38 London Journal, 224.

(*c*) *Nobel's Explosives Co.* v. *Jones*, 8 A. C. 5; 52 L. J. Ch. 339; see *Badische Anilin und Soda-Fabrik* v. *Johnson*, (1897) 2 Ch. 322; (1898) A. C. 200; 66 L. J. Ch. 497.

(*d*) *Washburn Manufacturing Co.* v. *Cunard Co.*, 6 R. P. C. p. 403.

(*e*) *Townsend* v. *Haworth*, 12 C. D. 831 n.; 48 L. J. Ch. 770 n.; *Savage* v. *Brindle*, 13 R. P. C. 266.

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and sells an article capable of being used as one of the component parts of a patented combination (*f*), is not liable as an infringer.

Directors.

The directors of a company may be liable for acts of infringement committed by workmen employed in their service, even where such workmen have acted in disobedience to express orders. Although the master in whose employment the infringement is committed is the proper defendant, his servants by whom he has committed the breach of patent right are equally liable and may be joined as defendants, and it is no answer to say that they only conformed to the orders of their employer (*g*).

Manufacturers and purchasers.

Where an infringing manufacturer sells the patented article, both the manufacturer who makes, and the purchaser who uses the same are liable to the patentee, and may be joined as co-defendants in one action (*h*). But where a plaintiff company sued the makers of infringing articles, and on motion for an interlocutory injunction accepted an order under which the defendants paid certain sums into Court to represent royalties, and undertook to keep an account till the trial, it was held that no interlocutory injunction could be obtained against customers who had purchased the infringing articles from the defendants, to restrain them from using such articles (*i*).

Foreigners.

Although foreign subjects committing acts of infringement in the United Kingdom are liable to be sued therefor (*k*), the Court has refused to allow property of a foreign sovereign which was an infringement of an English patent to be detained in this country against the will of that Sovereign (*l*).

(*f*) *Dunlop Pneumatic Tyre Co.* v. *Moseley & Co.*, (1904) 1 Ch. 612; 73 L. J. Ch. 417.

(*g*) *Betts* v. *De Vitre*, 3 Ch. 441; 37 L. J. Ch. 325; *Leahy* v. *Glover*, 14 R. P. C. 141; *Adair* v. *Young*, 12 C. D. 18; and see *Sykes* v. *Howarth*, 12 C. D. 826; 48 L. J. Ch. 769; *Day* v. *Davies*, (1904) 22 R. P. C. 31; *Lever Brothers* v. *Maldon Equitable Pioneers' Society*, (1912) 28 T. L. R. 295.

(*h*) *Proctor* v. *Bennis*, 36 C. D. 740; 57 L. J. Ch. 11.

(*i*) *Pneumatic Tyre Co.* v. *Goodman*, 13 R. P. C. 723.

(*k*) *Caldwell* v. *Vanvissengen*, 9 Ha. 415; 21 L. J. (N. S.) Ch. 97; *Vavasseur* v. *Krupp*, 9 C. D. 351; 27 W. R. 176; *Toni Tyres Co.* v. *Palmer Tyre Co.*, (1905) 22 R. P. C. 369. As to user for navigation purposes by foreign vessels in British waters, see 7 Edw. 7, c. 29, s. 48.

(*l*) *Vavasseur* v. *Krupp*, 9 C. D. 351; 27 W. R. 176.

Delay.

A man who seeks the aid of the Court for the protection of his patent rights should show proper diligence in making the application. If he has openly encouraged or silently acquiesced in the invasion of his right, or has allowed another to expend monies or erect works upon the faith that no impediment will be placed in the way of his enjoyment, his equity to the extraordinary interference of the Court is gone (*m*). This doctrine is applicable not only to the case of the particular conduct of the patentee towards the person with whom the controversy subsists, but also to cases where his conduct with others may influence the Court in the exercise of its equitable jurisdiction (*n*).

A man whose patent rights are invaded by several persons should give distinct notice to each to discontinue the infringement. If he proceeds against one only without giving notice to the others, and allows a considerable period to elapse before taking steps to enforce his rights against them, he may lose his right to the protection of the Court (*o*).

What delay will be fatal to an application for an interlocutory injunction will be hereafter considered (*p*); but delay or acquiescence which would be fatal to an application for an interlocutory injunction may not debar a plaintiff from obtaining a perpetual injunction at the trial (*q*).

SECTION 2.—WHAT IS AN INFRINGEMENT.

Form of letters patent.

The form of letters patent now in use provides that, to the end that the patentee may have and enjoy the sole use and exercise and the full benefit of the invention, no one shall during the patent term "either directly or indirectly make use of or put in practice the said invention or any part of the same, nor in anywise imitate the same, nor make or cause

(*m*) *Bovill* v. *Crate*, 1 Eq. 388; *Leonhardt* v. *Kallé*, 11 R. P. C. 534; *North British Rubber Co.* v. *Gormully*, 12 R. P. C. pp. 18, 20; *Gillette Safety Razor Co.* v. *Gamage & Co.*, (1907) 24 R. P. C. pp. 3, 4.

(*n*) *Rundell* v. *Murray*, Jac. 311; 23 R. R. 75; *Saunders* v. *Smith*, 3 M. & C. 711; 7 L. J. Ch. 227; 45 R. R. 367.

(*o*) *Smith* v. *London and South Western Railway Co.*, Kay, 417; 23 L. J. Ch. 562. As to the effect of delay and acquiescence, see further, *ante*, pp. 20-24.

(*p*) *Post*, p. 347.

(*q*) *Post*, p. 350.

to be made any addition thereto or subtraction therefrom whereby to pretend themselves the inventors thereof, without the consent, licence, or agreement of the patentee in writing under his hand and seal." Moreover the grant is to the patentee that he by himself, his agents or licensees, and no others, may "make, use, exercise and vend (*r*) the said invention," within the United Kingdom of Great Britain and Ireland and the Isle of Man.

Infringement.

A breach of the monopoly granted and of the prohibitory clause is an infringement of the patent for which an action will lie and an injunction may be obtained. The ways in which a patent may be infringed are pointed out by the prohibitory words of the grant. If the patent be valid, any act which trespasses upon the patentee's field of invention is an infringement.

Intention not to infringe immaterial.

The intention not to infringe a patent is immaterial if there has been an infringement. There may be an infringement though the intention of the party be perfectly innocent, and even though he may not know of the existence of the patent itself (*s*). On the other hand, mere intention cannot make any act done an infringement which without that intention would not be an infringement (*t*).

Innocent infringer when not liable for damages.

A defendant, however, who has innocently committed an infringement of a patent granted after the 1st of January, 1908, is now exempt from liability for damages by sect. 33 of the Patents and Designs Act, 1907, which provides that a patentee shall not be entitled to recover any damages in respect of any infringement of a patent granted after the commencement of this Act from any defendant who proves

(*r*) See Patents and Designs Act, 1907, 7 Edw. 7, c. 29, s. 14, sub-s. 2, and the Patent Rules (1908), rr. 49—51, sched. III., A., B.; *Badische Anilin und Soda-Fabrik* v. *Basle Chemical Works*, (1898) A. C. 200; 67 L. J. Ch. 141; *Saccharin Corporation* v. *Reitmeyer*, (1900) 2 Ch. 659, 663; 69 L. J. Ch. 761; *Badische Anilin und Soda-Fabrik* v. *Hickson*, (1906) A. C. pp. 425, 427; 75 L. J. Ch. 621.

(*s*) *Stead* v. *Anderson*, 2 W. P. C. 156; 16 L. J. C. P. 250; *Nobel's Explosives Co.* v. *Jones*, 8 A. C. p. 12; 52 L. J. Ch. 339; *Proctor* v. *Bennis*, 36 C. D. p. 760; 57 L. J. Ch. p. 22; *Saccharin Corporation* v. *Reitmeyer*, (1900) 2 Ch. p. 664; 69 L. J. Ch. p. 764.

(*t*) *Newall* v. *Elliott*, 10 Jur. N. S. p. 958.

that at the date of the infringement he was not aware, nor had reasonable means of making himself aware, of the existence of the patent, and the marking of the article with the word "patent," "patented," or any word or words expressing or implying that a patent has been obtained for the article shall not be deemed to constitute notice of the existence of the patent unless the word or words are accompanied by the year and number of the patent; provided that nothing in the section shall affect any proceedings for an injunction.

Infringement by manufacture.

Any person manufacturing the patented articles without the sanction of the patentee is an infringer of the patent and liable as such, though he procures the invention to be made in England by some one else, or procures it to be manufactured abroad, and afterwards imports it into the United Kingdom (*u*). But the making which is prohibited is a making for profit either direct or indirect, that is, a making calculated to interfere with the benefit which the patentee would otherwise derive from his invention (*x*).

By experiment.

It is therefore no infringement to make the patented article by way of *bonâ fide* experiment merely. If a man makes things with a view to improving upon an invention, or with a view to seeing whether an improvement can be made, that is not an infringement. If there be neither using nor vending of the invention for profit, the mere making for the purpose of experiment ought not to be considered within the meaning of the prohibition, and if it were, it is certainly not the subject for an injunction (*y*).

User.

Mere possession of a patented article is not necessarily user, but acquisition, and possession of such an article for trade purposes, should occasion arise, constitutes user whatever the nature of the article may be (*z*). Using or exercising the invention is an infringement, though the user may have been passive only and not active, and even though the user was

(*u*) *Gibson* v. *Campbell*, 1 W. P. C. 631; *Incandescent Gaslight Co.* v. *Brogden*, 16 R. P. C. 179.

(*x*) *United Telephone Co.* v. *Sharples*, 29 C. D. 164; 54 L. J. Ch. 633.

(*y*) *Frearson* v. *Loe*, 9 C. D. pp. 66, 67.

(*z*) *Adair* v. *Young*, 12 C. D. 13; *British Motor Syndicate* v. *Taylor*, (1901) 1 Ch. 122; 70 L. J. Ch. 21; and see *British United Shoe Co.* v. *Collier*, (1909) 26 R. P. C. pp 41, 539; (1910) 27 R. P. C. 567.

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merely during transit and England was not the final destination of the infringing article (*a*). At the same time Custom House agents who pass an infringing article through the Custom House are not liable to the patentee on the ground of user (*b*). An agent to be liable must be an agent in the using of the invention, and not merely a person who has something to do with the means by which the goods get from one place to another (*c*).

User.

Infringement by user may be negatived by showing that the user was by way of experiment only, but the Court will narrowly scrutinise such a defence to see that no profit was made (*d*), and where the experimental user is for the advantage of the person using the machine, even when pecuniary profit does not directly result, such user is an infringement. The use therefore of the invention for the purpose of instructing pupils in a business (*e*), or for the more economical management of a business (*f*), is an infringement. Further, the quantity made may be too considerable to be consistent with mere experiment (*g*).

To establish infringement by user, however, it must be shown that the infringer is using the invention for the same purpose as, or for a purpose analogous to, that claimed by the patentee. There is no infringement if the object of the patent is to produce one result and the object of the defendant is to produce another and quite different result (*h*).

Sale.

The patent grant confers an *exclusive* right to vend the patented article. Therefore the mere seller who has not himself made the article, and who may even be ignorant of the fact that it is an infringement of a patent at all, is liable

(*a*) *Betts* v. *Neilson*, 3 Ch. 429, 439; 5 H. L. 1; 34 L. J. Ch. 537; *British Motor Syndicate* v. *Taylor*, (1901) 1 Ch. 122; 70 L. J. Ch. 21.

(*b*) *Nobel's Explosives* v. *Jones*, 8 A. C. 5; 52 L. J. Ch. 339.

(*c*) Ib., 17 C. D. 742, 743; 50 L. J. Ch. 582.

(*d*) *Frearson* v. *Loe*, 9 C. D. p. 67.

(*e*) *United Telephone Co.* v. *Sharples*, 29 C. D. 164; 54 L. J. Ch. 633.

(*f*) *Higgs* v. *Goodwin*, E. B. & E. 529; 27 L. J. Q. B. 421; *Fletcher* v. *Glasgow Gas Commissioners*, 4 R. P. C. p. 389.

(*g*) *Muntz* v. *Foster*, 2 W. P. C. p. 101.

(*h*) *Fletcher* v. *Glasgow Gas Commissioners*, *supra*; *British United Shoe Co.* v. *Collier*, (1909) 26 R. P. C. p. 534; (1910) 27 R. P. C. p. 572. See *Robinson* v. *Smith and Ritchie* (1913), 30 R. P. C. 70.

as an infringer (*i*), but damages cannot be recovered against him where the infringement is of a patent granted after the 1st of January, 1908, if he proves that he had no reasonable means of making himself aware of the existence of the patent (*k*). The sale of an article in the making of which a patented product is an essential ingredient is an infringement (*l*). The sole right granted by the Crown includes a monopoly of the sale in this country of products made according to the patented process, whether made in the realm or elsewhere (*m*). Thus, the sale in England of articles made in France according to an English patent is an infringement of that patent (*n*). It is equally an infringement even when such importation is immediately followed by exportation after resale to a foreign customer (*o*). But a foreign manufacturer who sells and delivers an infringing article outside the United Kingdom cannot be made liable as an infringer here, even if he so acts with knowledge that such article is bought for importation into England; for where the contract of sale is completed by delivery of the infringing articles to an English importer abroad, the vendor does not make, use, exercise, or vend the protected invention within the realm (*p*).

Delivery of infringing articles abroad

A person who without licence offers for sale or exposes for sale a patented article is liable as an infringer even if no sale

Exposure of articles for sale.

(*i*) *Von Heyden* v. *Neustadt*, 14 C. D. p. 232; 50 L. J. Ch. 126; *Badische Anilin und Soda-Fabrik* v. *Isler*, (1906) 1 Ch. 605; 75 L. J. Ch. 411; (1906) 2 Ch. 443; 75 L. J. Ch. 749.

(*k*) 7 Edw. 7, c. 29, s. 33. See *ante*, p. 334.

(*l*) *Saccharin Corporation* v. *Anglo-Continental Chemical Works*, (1901) 1 Ch. 414; 70 L. J. Ch. 194; and see *British Motor Syndicate* v. *Taylor*, (1901) 1 Ch. 122; 70 L. J. Ch. 21.

(*m*) *Von Heyden* v. *Neustadt*, 14 C. D. 232, 233; 50 L. J. Ch. 126.

(*n*) *Elmslie* v. *Boursier*, 9 Eq. 217; 39 L. J. Ch. 328; *Von Heyden* v. *Neustadt*, *supra*; *Saccharin Corporation* v. *Anglo-Continental Chemical Works*, (1901) 1 Ch. 416; 70 L. J. Ch 194; cf. *Badische Anilin und Soda-Fabrik* v. *Hickson*, (1905) 2 Ch. 495; 74 L. J. Ch. 669; (1906) A. C. 419; 75 L. J. Ch. p. 623.

(*o*) *United Telephone Co.* v. *Sharples*, 29 C. D. 164; 54 L. J. Ch. 633.

(*p*) *Badische Anilin und Soda-Fabrik* v. *Johnson*, (1897) 2 Ch. 322; 65 L. J. Ch. 174; (1898) A. C. 200; 67 L. J. Ch. 141; *Saccharin Corporation* v. *Reitmeyer*, (1900) 2 Ch. 659; 69 L. J. Ch. 761; *Badische Anilin und Soda-Fabrik* v. *Hickson*, (1905) 2 Ch. 495; 74 L. J. Ch. 699; (1906) A. C. 419; 75 L. J. Ch. 621.

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is effected, and so it would seem if the article is merely used as a sample (*q*). But the sale of materials, which may be used for making a patented article, to a person other than the patentee, even if the vendor knows they are to be used for such purposes in breach of the patentee's rights, is no infringement for which an action will lie (*r*). A sale of parts adapted for fitting together would, however, probably be held to be an infringement (*s*), and a person who contracts to put the ingredients together infringes the patent, even if he employs a sub-contractor to do part of the work (*t*).

Sale of materials.

Sale of parts to be fitted together.

Repairs.

It is no infringement of a patent to merely repair a patented article. But if the process of repairing is carried so far as to result in what is really a new article made according to the patented invention, the person executing such repairs will be liable as an infringer (*u*). So, too, if repairing a patented article necessarily involves the introduction anew of some component part, itself the subject of a patent claim; such repairing can only be effected without infringement by some person holding a licence from the patentee of that component part (*x*).

Infringement by licensee.

Where a patented article is lawfully made and sold, the patentee licenses the use of the article in the hands of any future buyer, who is entitled to resell it, or otherwise deal with it as he thinks fit, and such buyer is no infringer (*y*).

(*q*) *Oxley* v. *Holden*, 8 C. B. N. S. 666; 30 L. J. C. P. 68; *British Motor Syndicate* v. *Taylor*, (1901) 1 Ch. 122; 70 L. J. Ch. 21.

(*r*) *Townsend* v. *Haworth*, 12 C. D. 831, n.; 48 L. J. Ch. 770, n.; *Dunlop Pneumatic Tyre Co.* v. *Moseley & Co.*, (1904) 1 Ch. 612; 73 L. J. Ch. 417.

(*s*) *United Telephone Co.* v. *Dale*, 25 C. D. p. 782; 53 L. J. Ch. 295; *Dunlop Pneumatic Tyre Co.* v. *Moseley*, (1904) 1 Ch. p. 619; 73 L. J. Ch. p. 420.

(*t*) *Sykes* v. *Howarth*, 12 C. D. 826; 48 L. J. Ch. 769; *Incandescent Gas Co.* v. *New Incandescent Co.*, 15 R. P. C. 81.

(*u*) *Dunlop Pneumatic Tyre Co.* v. *Neal*, (1899) 1 Ch. 807; 68 L. J. Ch. 378; *Dunlop Pneumatic Tyre Co.* v. *Holborn Tyre Co.*, (1901) 18 R. P. C. p. 226; *Dunlop Pneumatic Tyre Co.* v. *Moseley*, (1904) 1 Ch. pp. 174, 621; 73 L. J. Ch. p. 422; *Sirdar Rubber Co.* v. *Wallington*, (1905) 1 Ch. 454; 74 L. J. Ch. 315; (1906) 1 Ch. 252; 75 L. J. Ch. 233.

(*x*) *United Telephone Co.* v. *Nelson*, (1887) W. N. 193.

(*y*) *Thomas* v. *Hunt*, 17 C. B. N. S. 183; *Société Anonyme des Manufactures de Glaces* v. *Tilghman*, 25 C. D. p. 9; 53 L. J. Ch. p. 5; *Badische Anilin und Soda-Fabrik* v. *Isler*, (1906) 1 Ch. p. 610; 2 Ch.

Restrictions on sale of patented article.

But a patentee may by notice to a purchaser at the time of the sale impose conditions which will have the effect of giving such purchaser a limited licence only, and where this is the case the use of the invention by a purchaser, who exceeds the limits of his licence is an infringement (*z*). Section 38 of the Patents and Designs Act, 1907, however, makes null and void certain restrictive conditions in contracts entered into after the 1st of January, 1908, in relation to the sale or lease of or licence to use or work any patented article or process, the insertion by a patentee in a contract of such conditions being available as a defence to an action for infringement of the patent to which the contract relates while the contract is in force. Contracts made before the 1st of January, 1908, which contain such restrictive conditions may be determined on three months' notice in writing by either party and on payment of compensation as provided by the section.

Patents and Designs Act, 1907, s. 38.

Liability of employer for infringement by workmen.

An infringement is none the less an infringement because it is committed by workmen in disobedience to express orders to the contrary. If so committed in the course of their employment, the employer will be liable as well as his workmen for the infringement (*a*).

Improvements.

It is no answer to an action for infringement to show that the article or process complained of is in fact an improvement on the plaintiff's patent, if the original invention has been taken. If the substance of the invention is taken, it is no excuse to say that you have added something or omitted something, even if the addition or omission be an improvement (*b*).

443; 75 L. J. Ch. 749; *National Phonographic Co. of Australia* v. *Menck*, (1911) A. C. p. 349; 80 L. J. P. C. p. 110.

(*z*) *Incandescent Gas Co.* v. *Cantelo*, 12 R. P. C. 262; *Incandescent Gas Co.* v. *Brogden*, 16 R. P. C. 179; *British Mutoscope Co.* v. *Horner*, (1901) 1 Ch. p. 673; 70 L. J. Ch. 279; *Badische Anilin und Soda-Fabrik* v. *Isler*, *supra*; and see *National Phonograph Co.* v. *Menck*, (1911) A. C. 336; 80 L. J. P. C. 105.

(*a*) *Betts* v. *De Vitre*, 3 Ch. p. 442; *Day* v. *Davies*, (1904) 22 R. P. C. 34. An injunction will not be granted for an isolated act, *Lever* v. *Masbro' Equitable Pioneers Society*, (1912) 28 T. L. R. 295.

(*b*) *Ehrlick* v. *Ihlee*, 5 R. P. C. 43; *Wenham Gas Co.* v. *Champion Gas Co.*, 9 R. P. C. p. 56; *North British Rubber Co.* v. *Macintosh*, 11 R. P. C. 487; *Consolidated Car Heating Co.* v. *Came*, (1903) A. C. pp. 516, 517; 72 L. J. P. C. 110; *British Liquid Air Co.* v. *British*

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If a person discover a patentable improvement, he is not precluded from patenting his discovery; but if he cannot use his discovery without using the prior invention, he cannot put his discovery into practice during the term of the original patent without the licence of the original patentee (*c*).

Taking part of an invention.

It is not necessary to constitute an infringement that the whole of the patent should be taken. Taking an essential part of the invention is an infringement. If part is taken, there is an infringement, however much it may be disguised or sought to be hidden (*d*).

To ascertain the essential feature of an invention, the specification must be read and interpreted by the light of what was generally known at the date of the patent (*e*).

Combination patent.

Where the patent is for a combination merely, and none of the component parts are claimed separately, it is no infringement to take one of such parts, for parts which are not claimed are not protected (*f*).

Although to infringe a combination patent it must generally be shown that all essential parts have been taken, yet the taking of a part only will be an infringement if the inventor claims not only the whole combination but also separate parts of it as independent entities (*g*).

Where the patentee claims only a combination, the test of infringement is not whether all the component parts have been taken, but whether the essence of the combination as a

Oxygen Co., (1908) 25 R. P. C. 606; 26 R. P. C. 528; *Stone* v. *Broadfoot*, (1909) 26 R. P. C. p. 380; (1910) 27 R. P. C. 701; *Marconi* v. *British Radio Telegraph Co.*, (1911) 27 T. L. R. 277; 28 R. P. C. 217.

(*c*) *Crane* v. *Price*, 1 W. P. C. p. 413; 12 L. J. C. P. 81.

(*d*) *Dudgeon* v. *Thompson*, 3 A. C. p. 53; *Stone & Co.* v. *Broadfoot & Co.*, (1909) 26 R. P. C. p. 380; (1910) 27 R. P. C. 701; *Marconi* v. *British Radio Telegraph Co.*, (1911) 27 T. L. R. 277; 28 R. P. C. 217; *Lake* v. *Rotax Motor Co.*, (1911) 28 R. P. C. 540.

(*e*) *Marconi* v. *British Radio Telegraph Co.*, (1911) 27 T. L. R. p. 278; 28 R. P. C. p. 218.

(*f*) *Parkes* v. *Stevens*, 8 Eq. p. 367; 38 L. J. Ch. 627; *Davies* v. *Townsend*, R. P. C. 497; *Townsend* v. [illegible]*h*, 12 C. D. [illegible]; 48 [illegible] Ch. 770, n.; *Shop Pne[illegible]ure Co.* v. *Moseley*, (19[illegible] Ch. pp. 172, 173, 612; 73 L. J. Ch. 227, 417; *Stone & Co.* v. *Broadfoot & Co.*, *supra*; *Harrison Patents Co.* v. *Nicholson*, (1908) 25 R. P. C. 404.

(*g*) *Clark* v. *Adie*, 2 A. C. 320; 46 L. J. Ch. 585; *Consolidated Car Heating Co.* v. *Came*, (1903) A. C. pp. 516, 517; 72 L. J. P. C. 110;

whole has been taken. Therefore, any substantial union of the essential parts for the same object will be an infringement, even where all the parts have not been taken or where mechanical equivalents have been substituted for some of them (*h*). The mere fact that there are certain parts omitted and certain parts added, if the defendant has really taken the essence of the plaintiff's combination, will not prevent infringement (*i*).

Although it is not necessary that all the parts of a combination should be found in an infringement, it is necessary that all "essential" parts should be taken, for the omission of even one essential factor constitutes the remaining ingredients in fact a new combination; and the granting of a patent for one combination does not preclude another inventor attaining the same end by a simpler combination with fewer ingredients (*k*).

Colourable variations of an invention.

The infringer of a patent rarely takes the invention in all its details, but generally introduces variations to disguise the piracy, and it is always a question of degree whether such variations are sufficiently substantial to negative infringement, or are such alterations in non-essential details as would not protect an infringer. What has to be considered is not

Dunlop Pneumatic Tyre Co. v. *Moseley*, (1904) 1 Ch. pp. 171, 612; 73 L. J. Ch. 417; *Von Berkel* v. *Booth*, (1906) 23 R. P. C. p. 604; *Stone & Co.* v. *Broadfoot & Co.*, (1909) 26 R. P. C. p. 380; (1910) 27 R. P. C. 701.

(*h*) *Osmond* v. *Hirst*, 2 R. P. C. 265; *Harrison* v. *Anderston Foundry Co.*, 1 A. C. p. 593; *Nordenfelt* v. *Gardner*, 1 R. P. C. 61, 65; *Incandescent Gas Light Co.* v. *The De Mare Incandescent Gas Light System*, 13 R. P. C. p. 330; *Consolidated Car Heating Co.* v. *Came*, (1903) A. C. 517, 518; 72 L. J. P. C. 110; *Combination Hubs Co.* v. *Seabrook*, (1906) 23 R. P. C. 209; *Marconi* v. *British Radio Telegraph Co.*, (1911) 27 T. L. R. 277; 28 R. P. C. 181; *Collins* v. *Green & Co.*, (1912) 29 R. P. C. 217.

(*i*) *Proctor* v. *Bennis*, 36 C. D. 740, 756; 4 R. P. C. p. 354; *Consolidated Car Heating Co.* v. *Came*, (1903) A. C. pp. 517, 518; 72 L. J. P. C. 110; *Stone & Co.* v. *Broadfoot & Co.*, (1909) 26 R. P. C. 380; (1910) 27 R. P. C. 701; and see *Marconi* v. *British Radio Telegraph Co.*, (1911) 27 T. L. R. p. 277; 28 R. P. C. p. 217.

(*k*) *Gwynne* v. *Drysdale*, 3 R. P. C. 49; *Consolidated Car Heating Co.* v. *Came*; *Collins* v. *Green & Co.*; *Stone & Co.* v. *Broadfoot & Co.*, *supra*; see *British Light Controlling Co.* v. *Metropolitan Gas Meters Co.*, (1912) 29 R. P. C. 209; *New Inverted Incandescent Gas Lamp Co.* v. *Howlett*, (1913) 30 R. P. C. 169.

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simply whether in form or in circumstance that which the defendant has done varies from the plaintiff's specifications, but whether in reality, in substance and in effect the defendant has availed himself of the plaintiff's invention (*l*).

Substitution of equivalents.

Where the infringer takes the substance of a patented invention but varies the form by omitting certain parts and introducing elements known to be equivalents for the parts so omitted, he is said to infringe by the substitution of mechanical or chemical equivalents (*m*). But where the object attained is old and the only novelty consists in the substitution of better equivalents for those already used, the doctrine of mechanical or chemical equivalents does not apply; and the patentee cannot bring within his specification any equivalent which he has not described and claimed so as to make its use an infringement of his patent right (*n*).

Where the invention is a new process for attaining an old result, the patentee is entitled only to protection for his process, and it is no infringement to attain the same result by a different process (*o*). But where a new combination of well-known appliances is directed to the attainment of a new result, the patentee is not limited to the precise combination which he has patented, but is allowed a wider ambit for his monopoly (*p*). The doctrine of infringement by equivalents is, however, subject to this, that the equivalents used must be such as were known to be equivalents at the date of the patent; otherwise they constitute new discoveries and may be patented (*q*).

(*l*) *Consolidated Car Heating Co.* v. *Came*; *Marconi* v. *British Radio Telegraph Co.*, *supra*.

(*m*) *Sellers* v. *Dickinson*, 5 Ex. 312; 20 L. J. Ex. 417; *Benno Jaffe, etc.* v. *Richardson*, 11 R. P. C. 261; *British Vacuum Co.* v. *Exton Hotels Co.*, (1908) 25 R. P. C. 617; and see *Marconi* v. *British Radio Telegraph Co.*, *supra*.

(*n*) *Curtis* v. *Platt*, 3 C. D. 135, n; L. R. 1 H. L. 337; *Tweedale* v. *Ashworth*, 9 R. P. C. p. 128; 17 R. P. C. 625.

(*o*) *Hutchinson* v. *Pattulo*, 5 R. P. C. 301; see *Hicks* v. *Simmonds*, (1904) 21 R. P. C. 632; *Van Berkel* v. *Booth*, (1906) 23 R. P. C. pp. 603, 604.

(*p*) *Badische Anilin* v. *Levinstein*, 24 C. D. 170; 52 L. J. Ch. 704; affirmed on appeal, 12 A. C. 710.

(*q*) *Unwin* v. *Heath*, 5 H. L. C. 505; 25 L. J. C. P. S. See *Marconi* v. *British Radio Telegraph Co.*, (1911) 27 T. L. R. p. 278; 28 R. P. C. p. 218.

SECTION 3.—INTERLOCUTORY RELIEF.

Principles on which Court acts.

WHERE a patentee applies for an interlocutory injunction, the Court in adjudicating upon the application seeks as far as possible to maintain the *status quo* until the hearing. The Court considers what it can most satisfactorily do provisionally, and has regard to the degree of convenience and inconvenience to the parties concerned (*r*).

When the Court will grant relief by interlocutory injunction.

If one clear instance (*s*) of infringement, or a *primâ facie* case (*t*) of infringement is made out, and the plaintiff has not been guilty of laches (*u*), the Court will generally grant an interlocutory injunction in the following cases: (1) When the validity of the patent has already been established in a previous action. (2) When the patent is of old standing and the enjoyment under it has been uninterrupted. (3) When the validity of the patent is not in issue (*x*); and notwithstanding that the defendant offers to keep an account (*y*).

Conversely, in general, if the patent is new, and its validity has not been established, and it is endeavoured to be shown that it ought not to have been granted, the Court will not interfere (*z*).

When interlocutory injunction refused defendant ordered to keep account.

Where the Court refuses to grant an interlocutory injunction it generally requires the defendant to keep an account (*a*).

When validity of patent has been established in previous action.

When the validity of the patent has been established in a previous action, and the Court is satisfied that infringement has taken place, the plaintiff is generally entitled to an inter-

(*r*) *Bridson* v. *M'Alpine*, 8 Beav. 229; *Thompson* v. *Hughes*, 7 R. P. C. 76; *Brooks & Co.* v. *Lycett Saddle Co.*, 20 R. P. C. 575; *Osram Lamp Co.* v. *Smith*, (1913) 30 R. P. C. 114.

(*s*) *United Telephone Co.* v. *Sharples*, 29 C. D. p. 169; 54 L. J. Ch. 633.

(*t*) *Saccharin Corporation* v. *National Saccharin Co.*, (1909) 26 R. P. C. 654.

(*u*) See *post*, sect. 4.

(*x*) *Hill* v. *Thompson*, 3 Mer. p. 624; *Davenport* v. *Jepson*, 4 De G. F. & J. 440; *Newall* v. *Wilson*, 2 De G. M. & G. p. 288; *Renard* v. *Levinstein*, 10 L. T. (N. S.) 94; *Heine Solly & Co.* v. *Julius Norden & Co.*, (1904) 21 R. P. C. p. 518.

(*y*) *Dunlop Pneumatic Tyre Co.* v. *Hubbard Tyre Co.*, (1902) 19 R. P. C. 546.

(*z*) *Hill* v. *Thompson*, 3 Mer. p. 624; *Holophane Co.* v. *Berend*, 15 R. P. C. p. 19; *Spencer* v. *Holt*, (1903) 20 R. P. C. p. 144; *Zenith Motor Co.* v. *Collier & Co.*, (1911) 28 R. P. C. 563; *Trautner* v. *Patmore*, (1912) 29 R. P. C. 60.

(*a*) *Bovill* v. *Crate*, 1 Eq. 388; *Spencer* v. *Holt*; *Zenith Motor Co.* v. *Collier & Co.*, *supra*.

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locutory injunction, notwithstanding that the defendant disputes the validity of the patent on a ground not raised in the previous proceedings (*b*). A prior decision of a Scotch Court (*c*), and even the award of an arbitrator (*d*), have been held sufficient to justify the application of this rule.

The patentee's right to an injunction is strengthened if he can show that the defendant has been indemnifying a defendant in the former action (*e*), or that the defendant is a mere cover for a former infringer who is thus seeking to deprive the patentee of the benefits which have accrued to him under an earlier action (*f*).

Where the prior action has been won by the patentee through the defendant failing to appear at the trial, the same inference of validity will not be drawn. *Secus*, where this happens in two successive actions by the same plaintiff (*g*).

The value of a previous decision will not be discounted by a suggestion that the defendants were not in a position to call the best expert evidence (*h*). Nor will the circumstance that a patentee has compromised actions previously brought by him in respect of the same patent necessarily disentitle him to an interlocutory injunction (*i*).

When patent is of old standing.

The fact that a patent is of old standing and the enjoyment under it has been uninterrupted has long been recognised by the Court as a ground for granting an interlocutory injunction. And this is so though there may be considerable doubt as to the validity of the patent (*k*). "The rule is well settled that the Court assumes the validity of a patent and grants an injunction where there has been long and quiet

(*b*) *Newall* v. *Wilson*, 2 De G. M. & G. 282; *Heine Solly & Co.* v. *Julius Norden & Co.*, (1904) 21 R. P. C. 513.

(*c*) *Dudgeon* v. *Thompson*, 30 L. T. 244.

(*d*) *Lister* v. *Eastwood*, 26 L. T. (O. S.) 4.

(*e*) *Farbenfabriken vorm Bayer* v. *Dawson*, 8 R. P. C. 397.

(*f*) *Moser* v. *Sewell*, 10 R. P. C. 365.

(*g*) *Edison Bell Phonograph Co.* v. *Bernstein*, 14 R. P. C. 153.

(*h*) *Pneumatic Tyre Co.* v. *Marwood*, 13 R. P. C. 347.

(*i*) *Bracher* v. *Bracher*, 7 R. P. C. 421. Cf. *Roberts* v. *Graydon*, (1903) 20 R. P. C. 578.

(*k*) *Harmer* v. *Plane*, 14 Ves. 132; *Beeston* v. *Ford*, 2 Coop. C. C. 68; *Caldwell* v. *Vanvlissengen*, 9 Ha. 415; 21 L. J. Ch. 97; 89 R. R. 513; *Shillito* v. *Larmuth*, 2 R. P. C. 1.

enjoyment under it" (*l*). It is not possible to say exactly what length of time is sufficient for the purpose, but the rule has been acted upon in the case of a patent of six years' standing (*m*).

Long enjoyment, however, is not enough unless it be also undisturbed and exclusive. If the defendant can prove that the invention has been openly used by other persons during the term of the letters patent, this will rebut the inference which the Court draws in the patentee's favour from the long enjoyment (*n*). But disturbance will not defeat the right to an injunction where the patentee has taken proceedings successfully against the infringers. Nor is it necessary that the patentee should actually have gone to trial; if the infringers have submitted and recognised his title, that is sufficient (*o*).

Enjoyment of a patent right must include user. If the patent is of old standing but has only recently been put in use by the patentee, the rule favouring long enjoyment does not apply. The patentee must show actual public user of his patent (*p*).

Where validity not in dispute.

Where the validity of the patent is not in dispute, it must be assumed to be good, and consequently in such case, where the infringement is clearly established, the Court will protect even a recent patent by interlocutory injunction (*q*). The issue of validity may be excluded either through the defendant not electing to raise it, or through the relation of the parties being such that as against the defendant the Court must assume it in the plaintiff's favour. Thus a licensee of the original patentee would be precluded from disputing the validity of the patent (*r*).

(*l*) *Davenport* v. *Jepson*, 4 De G. F. & J. p. 447.

(*m*) *Bickford* v. *Skewes*, 1 W. P. C. 213; 8 L. J. Ch. 188; *Natural Colour Kinematograph Co.* v. *Speer*, (1912) 29 R. P. C. 669.

(*n*) *Collard* v. *Allison*, 4 M. & C. 487; 48 R. R. 161; *Curtis* v. *Cutts*, 2 Coop. C. C. 60; 8 L. J. Ch. 184.

(*o*) *Rothwell* v. *King*, 3 R. P. C. 379.

(*p*) *Plympton* v. *Malcolmson*, 20 Eq. 37; *Spencer* v. *Holt*, (1903) 20 R. P. C. 142.

(*q*) *Clarke* v. *Ferguson*, 1 Giff. 184; *Dudgeon* v. *Thompson*, 30 L. T. N. S. 244; *Wapshare Tube Co.* v. *Hyde Rubber Co.*, (1901) 18 R. P. C. p. 379.

(*r*) *Lawes* v. *Purser*, 6 E. & B.

SECTION 4.—PRACTICE ON INTERLOCUTORY INJUNCTIONS.

Interlocutory injunction.

An application for an interlocutory injunction to restrain the infringement of a patent is generally made by notice of motion in the Chancery Division (*s*). When a strong *primâ facie* case of infringement is made out and delay in obtaining relief would cause serious injury to the plaintiff, the Court will grant an injunction *ex parte*; a plaintiff who applies for an injunction *ex parte* must show *uberrima fides*, disclosing to the Court all the facts within his knowledge, so that the Court may be able to judge whether it should grant relief in the absence of the defendant (*t*). The plaintiff must also swear at the time of making the application that he believes that the invention was new and had never been practised in the kingdom at the date of the patent. It is not enough that it was believed to be new at the time when the patent was taken out; for although when he obtained the patent he might have honestly sworn as to his belief of such being the fact circumstances may have subsequently occurred, or information may have been since that time communicated to him sufficient to convince him that it was not his original invention and that he was under a mistake when he made the application for the patent (*u*).

Injunction *ex parte*.

Where defendant willing to keep an account.

Where a defendant is willing to keep an account pending the trial of the action the Court may refuse to grant the plaintiff an injunction (*x*); the Court will not, however, refuse the plaintiff an interlocutory injunction merely because the defendant offers to keep an account (*y*). But if the defendant refuses to keep an account, or does not appear, the Court

930; 26 L. J. Q. B. 25; 106 R. R. 868; *Crossley* v. *Dixon*, 10 H. L. C. 293; 32 L. J. Ch. 617; *Cummings* v. *Stewart*, (1913) 30 R. P. C. 9.

(*s*) See 7 Edw. 7, c. 29, sect. 24. In the King's Bench Division the application is by summons to a judge in chambers. See Order 54, r. 12 (e).

(*t*) *Dalglish* v. *Jarvie*, 2 Mac. & G. 231; 20 L. J. Ch. 475; 86 R. R. 83.

(*u*) *Hill* v. *Thompson*, 3 Mer. p. 624; 20 R. R. 156; *Sturz* v. *De la Rue*, 5 Russ. p. 329; 7 L. J. (O. S.) 47; 29 R. R. 24; *Mayer* v. *Spence*, 1 J. & H. 87; and see *Moser* v. *Jones*, 10 R. P. C. 368.

(*x*) *Leonhardt & Co.* v. *Kallé & Co.* 11 R. P. C. 534; *Holophane Co.* v. *Berend*, 15 R. P. C. 18; *Gillette Safety Razor Co.* v. *Gamage & Co.*, (1907) 24 R. P. C. p. 6.

(*y*) *Plimpton* v. *Spiller*, 4 C. D. p. 292; *Holophane Co.* v. *Berend*, 15 R. P. C. p. 20; *Dunlop Pneumatic Tyre Co.* v. *Hubbard Tyre Co.*, (1902) 19 R. P. C. 546.

will protect the patentee by granting the injunction (*z*). The Court requires a formal undertaking as to the account to be given, and where an undertaking is given a defendant is as much bound as he would be by an injunction, and must comply strictly therewith (*a*).

Application for injunction must be without delay.

A plaintiff who seeks an interlocutory injunction must apply to the Court without delay. Any laches on his part will disentitle him to this relief. Persons who assert legal rights are bound to come promptly, and, *à fortiori*, persons who assert only equitable rights (*b*). The delay which is fatal is delay after knowledge of the infringement. If the plaintiff is in ignorance, he is excused from the consequences of delay (c). It is not possible to say what exact amount of delay will be fatal. It must depend upon the circumstances of each case. Nine months (*d*), six months (*e*), three months (*f*), and even three weeks (*g*) have been held to be sufficient to disentitle the plaintiffs to interlocutory relief. On the other hand, delay of three months (*h*) and eleven months (*i*) may be explained, and will not then disentitle a plaintiff to relief. A plaintiff is not bound on a mere threat to immediately commence an action; he is entitled to wait a reasonable time to see whether anything is done in execution of the threat (*k*). Delay against one infringer is no ground for refusing interlocutory relief against another infringer in regard to whom there has been no such delay (*l*).

(*z*) *Clarke* v. *Nicols*, 12 R. P. C. 10.

(*a*) *Thomson* v. *Hughes*, 7 R. P. C. 71.

(*b*) *Leonhardt* v. *Kallé*, 11 R. P. C. 534; *North British Rubber Co.* v. *Gormully Co.*, 12 R. P. C. p. 20; *Actien Gesellschaft* v. *Temler*, 16 R. P. C. p. 449; *Gillette Safety Razor Co.* v. *Gamage & Co.*, (1907) 24 R. P. C. 1.

(*c*) *Crossley* v. *Derby Gas Co.*, 1 W. P. C. 120.

(*d*) *Bovill* v. *Crate*, 1 Eq. 388; *Actien Gesellschaft* v. *Temler*, 16 R. P. C. 449.

(*e*) *Edison-Bell* v. *Hough*, 11 R. P. C. 594; *Gillette Safety Razor Co.* v. *Gamage & Co.*, (1907) 24 R. P. C. 3.

(*f*) *Dunlop Pneumatic Tyre Co.* v. *Stone*, 14 R. P. C. 263.

(*g*) *Greer* v. *Bristol Tanning Co.*, 2 R. P. C. 268.

(*h*) *Losh* v. *Hague*, 1 W. P. C. 201.

(*i*) *United Telephone Co.* v. *Equitable Telephone Co.*, 5 R. P. C. 233; see *Welsbach Incandescent Gaslight Co.* v. *General Incandescent Co.*, 18 R. P. C. 533.

(*k*) *United Telephone Co.* v. *Equitable Telephone Co.*, *supra*.

(*l*) *Pneumatic Tyre Co.* v. *Warrilow*, 13 R. P. C. 284.

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Where injunction would stop works.

The object of the Court in granting an interlocutory injunction is to prevent mischief and keep things in *statu quo* until the hearing (*m*). Therefore, where a direction to keep an account will do the plaintiff ample justice, an injunction will not as a rule be granted (*n*). Where the trade of the defendant is an old and established one, and an injunction will have the effect of stopping extensive works, and will therefore be likely to do the defendant irreparable mischief, an injunction will not usually be granted on the defendant undertaking to keep an account (*o*). But where the trade of the defendant is a new one, and the defendant is the seller of goods to a considerable number of people, it would be less inconvenient and less likely to produce irreparable damage to restrain the defendant from selling, than it would be to allow him to sell and merely keep an account, thus forcing the plaintiff to commence a large number of actions against purchasers. Accordingly where the defendant's trade is a new one an injunction will generally be granted (*p*). In one case the Court, to prevent the injunction ruining the defendants' business, required the plaintiffs to undertake to supply the defendants, who had been using pirated machines, with lawful instruments until the hearing (*q*).

Undertaking as to damages.

When an interlocutory injunction is granted, it is the practice of the Court to require the plaintiff to give an undertaking to abide by any order the Court may make in the defendant's favour for damages, and this is so, even where the case for an interlocutory injunction is clearly made out (*r*). This rule aids the Court in that which is its great object on these applications, viz. to abstain from expressing any opinion on the merits of the case until the hearing (*s*).

(*m*) *Plimpton* v. *Spiller*, 4 C. D. p. 289.

(*n*) *Neilson* v. *Thompson*, 1 W. P. C. 286; *Thomson* v. *Hughes*, 7 R. P. C. 71.

(*o*) *Neilson* v. *Thompson*, 1 W. P. C. 286; *Plimpton* v. *Spiller*, 4 C. D. p. 292; see *Leeds Forge Co.* v. *Deighton Patent Flue Co.*, (1901) 18 R. P. C. 240 (injunction suspended).

(*p*) *Plimpton* v. *Spiller*, *supra*; *North British Rubber Co.* v. *Gormully Co.*, 12 R. P. C. 17—20.

(*q*) *United Telephone Co.* v. *Tasker*, 5 R. P. C. p. 633.

(*r*) *Renard* v. *Levinstein*, 2 H. & M. 628.

(*s*) *Wakefield* v. *Buccleuch*, 11 Jur. N. S. 524, *per* Kindersley, V.-C.

Expediting trial of action.

Sometimes when a motion for an interlocutory injunction is unsuccessful the plaintiff seeks to obtain an order expediting the trial of the action, but such an application will not usually be granted: the rule upon which the Court acts being that where an injunction is not given, the damages awarded at the trial are full compensation for any loss meanwhile sustained by the plaintiff (*t*). But in cases of special hardship the trial will be expedited (*u*).

SECTION 5.—PERPETUAL INJUNCTION.

After a patentee has conclusively established the validity of his patent, and that it has been infringed, he is as a general rule entitled to a perpetual injunction against the defendant (*x*). An injunction is not, however, a matter of course, but is in the discretion of the Court (*y*).

Perpetual injunction when granted.

Where the Court is satisfied that infringement has been committed, and that there is a probability that it will be repeated, an injunction will usually be granted. In such a case the plaintiff has *primâ facie* established his right to an injunction, and the Court will require exceptional circumstances to be shown to induce it to refuse this relief (*z*).

There must, however, be a probability that the infringement is going to be repeated. An injunction is a remedy against future injury, and the Court will not make the order if satisfied that no such injury is likely to occur. It is not because a man has done a wrong that an injunction will be granted against him. The Court must be satisfied of the probability of the continuance of the wrongful act (*a*).

(*t*) *Farbenfabriken vorm Bayer Co.* v. *Bowker*, 8 R. P. C. 136.

(*u*) *Edison-Bell* v. *Hough*, 11 R. P. C. 594; *Leonhardt* v. *Kallé*, 11 R. P. C. 534, see R. S. C. Order 50, r. 1, A.

(*x*) *Shelfer* v. *City of London Electric Co.*, (1895) 1 Ch. 310, 311; 64 L. J. Ch. 216, 226.

(*y*) *Spaul* v. *Monopole Cycle Co.*, (1906) 23 R. P. C. p. 648. The Court sometimes requires the plaintiff to take the defendant's undertaking instead of granting an injunction, see *Dover Co.* v. *New Tournend Cycle Co.*, (1904) 21 R. P. C. 135; *Badische Anilin und Soda-Fabrik* v. *Spirey*, (1905) 22 R. P. C. 65.

(*z*) *Frearson* v. *Loe*, 9 C. D. p. 65; *Shoe Machinery Co.* v. *Cutlan*, 12 R. P. C. 367; *Werner Motor Co.* v. *Gamage & Co.*, (1904) 1 Ch. pp. 267, 268; 73 L. J. Ch. p. 268.

(*a*) *Leahy* v. *Glover*, 10 R. P. C. 141; *Scott* v. *Hull Steam Fishing Co.*, 14 R. P. C. 143; *Proc-*

When refused.

Where there is no future threatened danger to the plaintiff's rights, an injunction will generally be refused (*b*). Though the infringement usually implies an intention to infringe in future, yet if the person who infringes undertakes not to repeat his infringement, or if there is reason to suppose on any other ground that the defendant will not infringe in future, the Court will not usually make an order for injunction (*c*).

When damages awarded instead of injunction.

There are, however, cases in which damages may be awarded instead of an injunction. In any instance in which a case for injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction, the Court may award damages in its place (*d*).

Delay or acquiescence, which would be fatal to an application for an interlocutory injunction, may not debar a plaintiff from obtaining a perpetual injunction at the trial (*e*), and, *quære*, whether mere delay to enforce a legal right is a bar to a claim for an injunction unless the delay is such as to cause a statutory bar to the action (*f*).

It is a good working rule that (1) if the injury to the plaintiff's rights is small, (2) and is one which is capable of being estimated in money, (3) and is one which can be adequately compensated by a small money payment, (4) and the case is one in which it would be oppressive to the defendant to grant an injunction, then damages may be given instead. There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct has disentitled himself from asking that damages may be assessed in substitution for an injunction (*g*).

tor v. *Bayley*, 42 C. D. p. 398; 59 L. J. Ch. 12; *Werner Motor Co.* v. *Gamage and Co.*, *supra*; *Burberrys* v. *Watkinson* (1906), 23 R. P. C. p. 142; *Spaul* v. *Monopole Cycle Co.*, (1906) 23 R. P. C. p. 648; *British United Shoe Co.* v. *Collier*, (1909) 26 R.P.C. p. 339; (1910) 27 R. P. C. 567.

(*b*) *Proctor* v. *Bayley*, 42 C. D. 390; 59 L. J. Ch. 12; *Lyon* v. *Newcastle Corporation*, 11 R. P. C. 218; *Burberrys* v. *Watkinson*, *supra*.

(*c*) *Proctor* v. *Bayley*, *supra*; *Scott* v. *Hull Steam Fishing Co.*, 14 R. P. C. 143 (damages awarded).

(*d*) *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. p. 321; 64 L. J. Ch. p. 229.

(*e*) *Proctor* v. *Bennis*, 36 C. D. p. 758; 57 L. J. Ch. p. 11.

(*f*) *Three Towns Banking Co.* v. *Maddever*, 27 C. D. 523; 53 L. J. Ch. 998; and see *Fullwood* v. *Fullwood*, 9 C. D. 176; 47 L. J. Ch. 459; *Rowland* v. *Mitchell*, 75 L. T. 65; *Jamieson* v. *Jamieson*, 15 R. P. C. p. 179.

(*g*) *Shelfer* v. *City of London*,

As stated above, an injunction will not be granted unless there is a probability of future injury. But past infringement of a recent date is *primâ facie* evidence of an intention to repeat the wrong (*h*).

Where several patents and uncertainty which is infringed.

Where a plaintiff is entitled to several patents for the production of a particular article, and it is not certain which patent has been infringed, an injunction will be granted for the period covered by the oldest of the patents (*i*).

For what period injunction granted.

As a rule an injunction will only be granted for the period covered by the life of the patent. When the patent has run out, or is upset on some ground of invalidity, the injunction ceases to operate (*k*).

Injunction and inquiry as to damages; patent subsequently revoked.

When an injunction was granted with an inquiry as to damages, and pending the inquiry the defendants obtained an order revoking the plaintiff's patent, it was held that on the inquiry as to damages the defendants were estopped from denying the validity of the patent (*l*).

An injunction granted on proof of one form of infringement binds the defendant as to that and all other possible forms of infringement of the same patent. Where, therefore, there is a new form of infringement after injunction granted, the proper course is not to commence a new action, but to move to attach the defendant for contempt for breach of the injunction (*m*).

Expiration of patent before hearing.

An injunction will not be granted if the patent has expired before the hearing (*n*); and as a rule the Court will refuse to grant an injunction where the patent is about to expire, for

&c., (1895) 1 Ch. p. 321; 64 L. J. Ch. p. 229; *Jenkins* v. *Hope*, (1896) 1 Ch. 278; 65 L. J. Ch. 249; *Scott* v. *Hull Steam Fishing Co.*, 14 R. P. C. 143.

(*h*) *Proctor* v. *Bayley*, 42 C. D. p. 398; 59 L. J. Ch. 12.

(*i*) *Saccharin Corporation* v. *Dawson*, (1902) 19 R. P. C. 169; *Saccharin Corporation* v. *Jackson*, (1903) 20 R. P. C. 611; *Saccharin Corporation* v. *Mack & Co.*, (1906) 23 R. P. C. 25.

(*k*) *Daw* v. *Eley*, 3 Eq. 496; 36 L. J. Ch. 482; and see *Saccharin Corporation* v. *Dawson*, (1902) 19 R. P. C. 169; *Saccharin Corporation* v. *Jackson*, (1903) 20 R. P. C. 611.

(*l*) *Poulton* v. *Adjustable Cover and Boiler Co.*, (1908) 2 Ch. 430; 77 L. J. Ch. 780.

(*m*) *Thompson* v. *Moore*, 6 R. P. C. 445, and see *Lancashire Explosives Co.* v. *Roburite Co.*, 13 R. P. C. 429; *Davidson* v. *Sun Fan Co.*, (1906) 23 R. P. C. 493.

(*n*) *Saccharin Corporation* v. *Quincey*, (1900) 2 Ch. 246; 69 L. J. Ch. 530; *Kane and Pattison* v. *Boyle & Co.*, 18 R. P. C. 325.

in such case damages will usually be a sufficient remedy (*o*). But where a quantity of infringing goods had been manufactured just before the expiration of the patent, with the object of throwing such goods on the market as soon as the patent was at an end, a perpetual injunction was granted to restrain the sale of such goods both before and after the expiration of the patent term (*p*).

Injunction not granted against third parties.

An injunction will not be granted against third parties, though they may be ordered to pay costs. Where a plaintiff finds, pending the action, that he has a direct claim against a third party, he ought to apply to amend by adding him as co-defendant; but this cannot be done after trial and for the purposes of an appeal (*q*).

Where the secretary of the defendant company had taken no part in the acts of infringement, but was made a defendant and appeared and put the fact of infringement in issue, an injunction was granted against him with costs, but no damages (*r*).

Defendant consenting to injunction by mistake.

A defendant who by surprise or mistake has consented to an injunction will be allowed to withdraw such consent; but the subsequent discovery of facts on which he could found a defence is not a sufficient ground for withdrawal (*s*).

Form of injunction.

The injunction usually restrains the defendant, his servants, agents and workmen from making, selling, using, offering for sale, or otherwise wrongfully dealing with goods made in infringement of the plaintiff's patent; such being the case, the injunction may be useful though the defendant be a foreigner (*t*).

Amendment of specification after injunction granted.

If a patentee amends his specification after he has been granted an injunction, the injunction no longer holds good (*u*).

(*o*) *Betts* v. *Gallais*, 10 Eq. 392; *Welsbach Incandescent, &c., Co.* v. *New Incandescent Co.*, (1900) 1 Ch. 843; 69 L. J. Ch. 343.

(*p*) *Crossley* v. *Beverley*, 1 R. & M. 166, n; *Crossley* v. *Derby Gas Light Co.*, 1 R. & M. 166; 4 L. J. Ch. 25.

(*q*) *Edison* v. *Holland*, 41 C. D. 28, 32; 58 L. J. Ch. 524.

(*r*) *Welsbach Incandescent Co.* v. *Daylight Co.*, 16 R. P. C. 344.

(*s*) *Elsas* v. *Williams*, 54 L. J. Ch. 336; 52 L. T. 39.

(*t*) *Badische Anilin, &c.* v. *Johnson*, (1896) 1 Ch. 25.

(*u*) *Dudgeon* v. *Thompson*, 3 A. C. 34; see *In re Kenrick and Jefferson's Patent*, (1912) 29 R. P. C. 25.

A patentee's remedy for breach of an injunction is a motion for committal and in the case of a corporation, for the sequestration of its property and the committal of its directors (*x*). It is not absolutely necessary that the order should have been served, but knowledge that the injunction has been granted must be brought home to the defendant. If there is a breach before there is time to serve the order, the Court will inquire whether the defendant knew of it, and he will not be allowed to escape by any subterfuge. If he was in Court, he will not be allowed to say he did not hear it; if just outside the Court, he will not be heard to say he did not know of it (*y*). But if the plaintiff by his long delay in getting the order drawn up or otherwise gives the defendant reason to think that he does not intend to enforce the injunction, that is an answer to a motion to commit (*z*).

Committal will not be ordered lightly; the case must be strictly made out on the affidavits (*a*); and the Court will not encourage motions to commit where no real case for committal can be made out, and all the plaintiff wants is an apology and costs (*b*).

Defendants who disobey an injunction render themselves liable to committal, and in the case of a company to sequestration of their property, even though they act in the *bonâ fide* belief that they are not guilty of any infringement; but where they are clearly innocent the Court usually directs that the writ should issue but not be enforced if the defendants deliver up the infringing articles and pay costs (*c*).

(*x*) *Spencer* v. *Ancoats Vale Rubber Co.*, 6 R. P. C. 46; *Gillette Safety Razor Co.* v. *Gamage & Co.*, (1907) 24 R. P. C. p. 6; *Fox* v. *Astrachan Co.*, (1910) 27 R. P. C. 769.

(*y*) *United Telephone Co.* v. *Dale*, 25 C. D. 784, 785; 53 L. J. Ch. 295; *D.* v. *A. & Co.*, (1900) 1 Ch. p. 487; 69 L. J. Ch. p. 383; *Re Launder*, (1908) 98 L. T. 554; W. N. 49 (undertaking).

(*z*) *United Telephone Co.* v. *Dale*, 25 C. D. p. 786; 53 L. J. Ch. p. 297.

(*a*) *Dick* v. *Haslam*, 8 R. P. C, 196.

(*b*) *Plating Co.* v. *Farquharson*, 17 C. D. 49; 50 L. J. Ch. 406.

(*c*) *Lyon* v. *Goddard*, 11 R. P. C. 115; see *Meters Co.* v. *Metropolitan Gas Meters Co.*, (1907) 24 R. P. C. 511; *Gillette Safety Razor Co.* v. *Gamage & Co.*, (1907) 24 R. P. C. p. 6; *Fox* v. *Astrachan Co.*, (1910) 27 R. P. C. 769.

Costs.

Where defendant submits.

If the defendant offers to submit to an injunction, or promises no longer to infringe, it will depend upon circumstances whether he will be ordered to pay the costs incurred subsequently to his submission. The real point is whether the plaintiff must go on with his proceedings, or whether he is already sufficiently protected by the surrender of his opponent (*d*). The plaintiff is generally entitled to go on, if there be any doubt, at any rate until he has obtained his injunction, or if the defendant offers unreasonable conditions, as that the order should not be advertised (*e*), but the Court will use its discretion on the facts of each case (*f*).

Where the plaintiff comes to enforce a legal right, and there has been no misconduct on his part, the Court will not deprive the plaintiff of his costs (*g*). But this does not mean that every innocent purchaser of a small quantity of infringing goods incurs a liability to pay the costs of an action to restrain the infringement of the patent (*h*). The case is, however, different where the quantity of goods purchased is large, that is, large enough to justify the plaintiffs in suspecting that the goods were intended for distribution and not for personal use (*i*).

Notice of action.

As a general rule a plaintiff is entitled to issue his writ without notice to the defendant, and after that the only offer which the defendant can properly make is to submit to an injunction and to pay the costs (*k*). At the same time a plain-

(*d*) *Upmann* v. *Elkan*, 7 Ch. 130; 41 L. J. Ch. 246; *Proctor* v. *Bayley*, 42 C. D. 390; 59 L. J. Ch. 12; *Werner Motors Co.* v. *Gamage & Co.*, (1904) 1 Ch. pp. 267, 268; 73 L. J. Ch. 268; see *Gill* v. *Philips*, (1912) 29 R. P. C. 397.

(*e*) *Henry Clay* v. *Godfrey Phillips*, (1910) 27 R. P. C. 508.

(*f*) *Colburn* v. *Simms*, 2 Ha. 543; 12 L. J. Ch. 388; 62 R. R. 225; *Nunn* v. *D'Albuquerque*, 34 Beav. 595; *Jenkins* v. *Hope*, (1896) 1 Ch. 280; 65 L. J. Ch. 249.

(*g*) *Cooper* v. *Whittingham*, 15 C. D. 501; 49 L. J. Ch. 752; *Upmann* v. *Forester*, 24 C. D. 231; 52 L. J. Ch. 946; but see *Walter* v. *Steinkopff*, (1892) 3 Ch. p. 500; 61 L. J. Ch. 521.

(*h*) *American Tobacco Co.* v. *Guest*, (1892) 1 Ch. 630; 61 L. J. Ch. 242; *Leahy* v. *Glover*, 10 R. P. C. 141; *Burberrys* v. *Watkinson*, (1906) 23 R. P. C. 141.

(*i*) *Upmann* v. *Forester*, 24 C. D. 231; 52 L. J. Ch. 946.

(*k*) *Wittmann* v. *Oppenheim*, 27

tiff must not act unreasonably, and if he refuses a reasonable offer, although an injunction is granted, no costs may be given (*l*). Thus, where the defendant innocently sold the plaintiff's articles as being of his own manufacture, but only did so on one occasion, and the plaintiff commenced proceedings for an injunction without giving the defendant warning or asking for an undertaking not to repeat the act, the motion for an injunction was dismissed, no order being made as to costs (*m*). And, where the defendant did not dispute the plaintiff's patent, and had never used the machine (which he had purchased and which infringed the plaintiff's patent), and did not intend to use it, and undertook not to use it, and the plaintiff would not accept this or any other undertaking, on the undertaking being given to the Court, the motion for an injunction was dismissed with costs (*n*). So also, where the defendant before the motion for an injunction, offered the plaintiff an unconditional undertaking not to infringe, and that the motion should be treated as the trial of the action, and the plaintiff refused the defendant's offer, the motion was dismissed with costs (*o*).

Offer by defendant.

Stay of Execution.

The Court has a discretion to stay proceedings pending an appeal, but the general rule is that in the case of an injunction a stay will not be granted (*p*). But each case depends largely upon its own special circumstances. If a stay is granted as to the injunction, the defendant will generally be put on terms to keep an account and to appeal promptly (*q*). In a recent

C. D. 260, 268; 54 L. J. Ch. 56; but see *Burberrys* v. *Watkinson*, (1906) 23 R. P. C. 141, as to giving notice.

(*l*) *Nunn* v. *D'Albuquerque*, 34 Beav. 595; *Burberrys* v. *Watkinson*, *supra*.

(*m*) *Burberrys* v. *Watkinson*, *supra*.

(*n*) *Lyon* v. *Newcastle Corporation*, 11 R. P. C. 218; and see *Jenkins* v. *Hope*, (1896) 1 Ch. 280; 65 L. J. Ch. 249.

(*o*) *Spaul* v. *Monopole Cycle Co.*, (1906) 23 R. P. C. 647; see *Gill* v. *Philips*, (1912) 29 R. P. C. 397.

(*p*) *Otto* v. *Steel*, 3 R. P. C. p. 121; *Proctor* v. *Bennis*, 4 R. P. C. p. 363; *Lancashire Explosives Co.* v. *Roburite Explosives Co.*, 12 R. P. C. p. 483; *Pilkington* v. *Yeatley Vacuum Hammer Co.*, 18 R. P. C. 459.

(*q*) *Kaye* v. *Chubb*, 4 R. P. C. 23; *National Opalite Syndicate* v. *Coralite Syndicate*, 13 R. P. C. p. 658; *North British Rubber Co.*

case (*r*) in lieu of a stay, the defendants were allowed to carry on business taking a licence from the plaintiffs, without prejudice to their appeal, the plaintiffs undertaking to return the royalties if the defendants' appeal was successful. If the defendant is engaged in executing orders for the article complained of, and the question of infringement is one of difficulty and doubt, the Court is more disposed to stay the injunction pending appeal (*s*). But where defendants, after warning that they were infringing, accepted orders and proceeded to execute them, with their eyes open, the Court refused a stay although the orders were for public authorities, and it would have been a convenience to the public to grant a stay (*t*). An injunction has, however, been suspended on the ground of public convenience (*u*).

v. *Gormuly, &c. Co.*, 14 R. P. C. 282, 302 (payment into Court); *Leeds Forge Co.* v. *Deighton's Flue Co.*, 18 R. P. C. p. 240; *Osram Lamp Works* v. "*Z.*" *Electric Lamp Co.*, (1912) 28 R. P. C. 402.

(*r*) *Jandus Arc Lamp Co.* v. *Arc Lamp Co.*, (1905) 22 R. P. C. 298.

(*s*) *Ducketts* v. *Whitehead*, 12 R. P. C. p. 191; and see *Lyon* v. *Goddard*, 10 R. P. C. 136.

(*t*) *Lyon* v. *Goddard*, 10 R. P. C. 348.

(*u*) *Hopkinson* v. *St. James Electric Light Co.*, 10 R. P. C. p. 62.

CHAPTER VIII.

INJUNCTIONS TO RESTRAIN THE PASSING OFF BY A MAN OF HIS GOODS AS THE GOODS OF ANOTHER, AND THE PIRACY OF TRADE MARKS AND NAMES.

Jurisdiction.

THE jurisdiction of the Court in restraining by interlocutory injunction the passing off by one man of his own goods as being the goods of another, and the piracy of trade marks and trade names, is in aid of the legal right and is founded on the equity of protecting property from irreparable damage. The principles upon which the Court interferes in such cases are the same as those upon which it acts in other cases in protecting legal rights to property from violation (*a*).

Passing off.

The law relating to the passing off by a man of his goods as the goods of another was stated by Kay, L.J., in *Powell* v. *Birmingham Brewery Co.* (*b*) in the following ten propositions:—

"(1) It is unlawful for a trader to pass off his goods as the goods of another (*c*).

(2) Even if this be done innocently it will be restrained: *Millington* v. *Fox* (*d*).

(3) *A fortiori*, if done designedly, for that is a fraud.

(*a*) *Leather Cloth Co.* v. *American Cloth Co.*, 4 De G. J. & S. 137; 33 L. J. Ch. 199; *McAndrew* v. *Bassett*, 4 De G. J. & S. 384; 33 L. J Ch. 561. As to property in a trade mark, see *Burberry's* v. *Cording & Co.* (1909), 100 L. T. 985; 25 T. L. R. 576; *Warwick Tyre Co.* v. *New Motor and General Rubber Co.*, (1910) 1 Ch. pp. 255, 256; 79 L. J. Ch. 177.

(*b*) (1896) 2 Ch. pp. 79, 86; *S. C.*, (1897) A. C. 710.

(*c*) See *Reddaway* v. *Banham*, (1896) A. C. 199; 65 L. J. Q. B. 381; *Burberry's* v. *Cording & Co.*; *Warwick Tyre Co.* v. *New Motor and General Rubber Co.*, *supra*; *Edge* v. *Niccolls*, (1911) A. C. 693; 80 L. J. Ch. 744; *Dental Manufacturing Co.* v. *Trey*, (1912) 3 K. B. pp. 85, 87; 81 L. J. K. B. 1162; *Lever Bros.* v. *Masbro' Equitable Pioneers Society*, (1912) 106 L. T. 476; 28 T. L. R. 294; *W. & G. Du Cros* v. *Gold*, (1913) 29 T. L. R. 117.

(*d*) 3 My. & Cr. 338; and see *Cellular Clothing Co.* v. *Maxton*, (1899) A. C. p. 334; 68 L. J. P. C. 72; *Bowring* v. *Swan and Edgar*, (1903) 1 Ch. 223, 227; 72 L. J. Ch. 168; *Weingarten* v. *Bayer*, (1905) 92 L. T. 511, 514; 19 T. L. R. 604; *Warwick Tyre Co.* v. *New Motor Rubber Co.*, (1910) 1 Ch. 256; 79 L. J. Ch. 177; *Catterson* v. *Anglo-*

(4) Although the first purchaser is not deceived, nevertheless if the article is so delivered to him as to be calculated to deceive a purchaser from him, that is illegal: *Sykes* v. *Sykes* (*e*).

(5) One apparent exception is that where a man has been describing his goods by his own name, another man having the same name cannot be prevented from using it, though this may have the effect of deceiving purchasers: *Burgess* v. *Burgess* (*f*); *Turton* v. *Turton* (*g*).

(6) But this exception does not go far. A man may so use his own name as to infringe the rule of law. "It is a question of evidence in each case whether there is false representation or not": *per* Turner, L.J., in *Burgess* v. *Burgess* (*f*). So he may be restrained if he associates another man with him so that under their joint names he may pass off goods as the goods of another person: *Croft* v. *Day* (*h*); *Clayton* v. *Day* (*i*); *Melachrino* v. *Melachrino Egyptian Cigarette Co.* (*k*).

(7) Another apparent exception is where a man has under a patent had a monopoly for fourteen years and has given the article a descriptive name he cannot when the patent has expired prevent another from selling it under that name: *Young* v. *Macrae* (*l*); *Linoleum Manufacturing Co.* v. *Nairn* (*m*).

(8) I am not sure this would be so if the name so used were the name of the patentee, or even a purely fanciful name not descriptive.

(9) Certainly where there has not been a patent and an article has been made and sold under a fanciful name not descriptive so that the article as made by one person has acquired

Foreign, etc., Co., (1911) 28 R. P. C. 74; *Lever* v. *Masbro' Equitable Pioneers Society*, (1912) 106 L. T. 474; 28 T. L. R. 294; *Yeatman* v. *Homberger*, (1913) 107 L. T. 742.

(*e*) 3 B. & C. 541; 3 L. J. (O. S.) K. B. 46.

(*f*) 3 De G. M. & G. 896; 22 L. J. Ch. 675. See *Artiengesellschaft Hommel's Haematogen* v. *Hommel*, (1912) 29 R. P. C. 385.

(*g*) 42 C. D. 128; see *Jamieson* v. *Jamieson*, 15 R. P. C. 169; *Chivers* v. *Chivers*, 17 R. P. C. 420.

(*h*) 7 Beav. 84.

(*i*) 26 S. J. 343.

(*k*) 4 R. P. C. 215.

(*l*) 9 Jur. N. S. 322.

(*m*) 7 C. D 834.

reputation under that name, another trader will not be permitted to use the name for a similar article made by him: *Braham* v. *Bustard* (*n*); *Cockrane* v. *Macnish* (*o*).

(10) To this last proposition there is again a limitation. If the first maker has slept upon his rights and allowed the name to be used by others until it has become *publici juris*, the Court will not interfere."

A defendant will also be restrained from passing off one class of the plaintiff's goods as and for a superior class of goods dealt in by the plaintiff (*p*).

In order to substantiate a case of "passing off" the plaintiff must prove that the name (unless there is express representation by the defendant), or the get-up by which the defendant seeks to describe the incriminated goods is the proper and accepted description of the plaintiff's goods, or of a definite article or class of articles of the plaintiffs for which the incriminated article or class of articles is passed off (*q*).

Trade mark.

A registrable trade mark is defined by the Trade Marks Act, 1905, as a mark used or proposed to be used upon or in connection with goods (*r*) for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection (*s*), certification, dealing with, or offering for sale; "mark" includes a device, brand, heading, label, ticket, name, signature, word, letter (*t*), numeral, or any combination thereof.

Where such a mark, brand or symbol comes by use to be

(*n*) 1 H. & M. 447.

(*o*) (1896) A. C. 225.

(*p*) *Teacher* v. *Levy*, (1906) 23 R. P. C. 117; *Spalding* v. *Gamage & Co.*, (1913) 29 T. L. R. 541.

(*q*) *Hunt Roope* v. *Ehrmann, Bros.*, (1910) 2 Ch. 198; 79 L. J. Ch. 533. As to "trap-orders," see *Carr* v. *Crisp*, (1902) 19 R. P. C. 497, 501; *Ripley* v. *Griffiths*, (1902) 19 R. P. C. 597; *Truefitt* v. *Edney*, (1903) 20 R. P. C. 321; *Lever Bros.* v. *Masbro' Equitable Pioneers Society*, (1912) 106 L. T. 472; 28 T. L. R. 294.

(*r*) 5 Edw. 7, c. 15, s. 3. A trade mark may be registered in connection with natural products of the earth (*Grand Hotel Co. of Caledonia Springs* v. *Wilson*, (1904) A. C. p. 110; 73 L. J. P. C. 1; *Major Bros.* v. *Franklin*, (1908) 1 K. B. 712; 77 L. J. K. B. 601).

(*s*) A salesman on commission may be proprietor of a trade mark in connection with the goods he sells on commission (*Major Bros.* v. *Franklin*, *supra*).

(*t*) As to registration of initial letters, see R. W. & G. Du Cros., (1913) A. C. 624; 29 T. L. R. 772.

recognised in trade as the mark of the goods of a particular trader so that thereby persons purchasing goods of that description know them to be his, it becomes to that extent the exclusive property of that particular trader, and no other trader has the right to brand the same or a similar mark on goods of the same description. By doing so he would be substantially representing the goods to be those of the trader who had previously adopted the mark or brand in question, and so would or might deprive him of the profit he might have made by the sale of the goods which the purchaser intended to buy. The law considers this to be a wrong towards the person whose mark is thus assumed for which he has a right of action (*u*). The right, however, to the exclusive use of a trade mark is limited to its use in connection with particular goods or classes of goods (*x*). Apart from the particular use or application there is no right to the use of the symbol. The use of the same mark or symbol in connection with goods of a totally different character is not an infringement of the right (*y*). Nor can the right to a trade mark be severed from the article indicated by it (*z*), nor from the goodwill of the business in which it has been used (*a*).

Trade mark must be for particular goods.

Can only be assigned in connection with goodwill.

A trade mark must be registered before any action can be brought to prevent or to recover damages for its infringement, except where the mark was in use before the 13th August, 1875, and it has been refused registration under the Trade Marks Act, 1905 (*b*).

Must be registered before action for infringement can be brought.

(*u*) *Leather Cloth Co.* v. *American Cloth Co.*, 11 H. L. C. 538; 35 L. J. Ch. 53; *Glenny* v. *Smith*, 2 Dr. & Sm. 476; *Seixo* v. *Provezende*, 1 Ch. 192; *Somerville* v. *Schembri*, 12 A. C. 454; 56 L. J. P. C. 16; *Weingarten* v. *Bayer*, (1905) 92 L. T. 512; 22 R. P. C. 341.

(*x*) See Trade Marks Act, 1905, s. 8.

(*y*) *Leather Cloth Co.* v. *American Cloth Co.*, 4 De G. J. & S. 137; 33 L. J. Ch. 199; *Somerville* v. *Schembri*, *supra*; *Hart* v. *Colley*, 44 C. D. 193; 59 L. J. Ch. 355.

(*z*) *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *McAndrew* v. *Bassett*, 4 De G. J. & S. 384; 33 L. J. Ch. 566, and see Trade Marks Act, 1905, ss. 3, 8, 22, 39.

(*a*) See *Rey* v. *Lecouturier*, (1908) 2 Ch. p. 733; 78 L. J. Ch. p. 190; (1910) A. C. p. 270; 79 L. J. Ch. p. 400; *Ullmann* v. *Leuba*, (1910) A. C. p. 446; 78 L. J. P. C. ... *Re Johnson's Trade Mark*, (1909) 26 R. P. C. 195; Trade Marks Act, 1905, s. 22.

(*b*) Trade Marks Act, 1905, s. 42.

Remedy of owner of unregistered trade mark.

The owner of an unregistered trade mark may, however, be entitled to relief in an action for passing off, sect. 45 of the Trade Marks Act, 1905, providing that "nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as those of another person or the remedies in respect thereof."

Effect of registration

The registration of a person as proprietor of a trade mark, if valid, gives such person the exclusive right to the use of such trade mark upon or in connection with the goods in respect of which it is registered (*c*).

Primâ facie evidence of validity.

And in all legal proceedings relating to a registered trade mark the fact that a person is registered as proprietor of such trade mark is *primâ facie* evidence of the validity of the original registration of such trade mark and of all subsequent assignments of the same (*d*), and in all proceedings relating to a registered trade mark, including applications for the rectification of the register (*e*), the original registration of such trade mark is, after the expiration of seven years from the date of such original registration, to be taken to be valid in all respects, unless such original registration was obtained by fraud, or the trade mark offends the provisions of sect. 11 of the Act by being calculated to deceive, or by being contrary to law or morality (*f*).

Conclusive after seven years.

Where the alleged infringement consists of using not the exact thing upon the register, but something similar to it, the Court must in considering whether or not there has been an infringement proceed on the old principle that a man must not pass off his goods as the goods of another (*g*).

Registrable trade marks.

By sect. 9 of the Trade Marks Act, 1905, a registrable trade mark must contain or consist of at least one of the following essential particulars:—

(1) The name of a company, individual, or firm represented in a special or particular manner;

(2) The signature of the applicant for registration or some predecessor in his business;

(*c*) Sect. 39.
(*d*) Sect. 40.
(*e*) Sect. 35.
(*f*) Sect. 41.

(*g*) *Re Edwards' Trade Mark*, 30 C. D. p. 471; 55 L. J. Ch. 125; *Re Lyndon*, 32 C. D. 109; 55 L. J. Ch. 456; *Bourne* v. *Swan and Edgar*,

(3) An invented word or invented words (*h*);

(4) A word or words having no direct reference to the character or quality of the goods (*i*) and not being according to its ordinary signification a geographical name or a surname (*k*);

(5) Any other distinctive mark (*l*), but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1), (2), (3) and (4), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark (*m*).

Any special or distinctive word or words, letter, numeral, or combination of letters or numerals used as a trade mark by the applicant or his predecessors in business before August, 1875, which has continued to be used (either in its original form or with additions or alterations not substantially affecting the identity of the same), down to the date of the application for registration, is registrable under the Act.

For the purposes of the section "distinctive" means adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

(1903) 1 Ch. p. 223.

(*h*) See *Eastman Photographic Co.* v. *Comptroller-General*, (1898) A. C. 571; 67 L. J. Ch. 628 (Solio); *Re Linotype Company's Trade Mark*, (1900) 2 Ch. 238; 69 L. J. Ch. 625 (Tachytype); *Re Uneeda Trade Mark*, (1902) 1 Ch. 783; 71 L. J. Ch. 353; *Kodak Co.* v. *London Stereoscopic Co.*, (1903) 20 R. P. C. 337; 19 T. L. R. 297; *Christy* v. *Tipper*, (1904) 1 Ch. 696; 73 L. J. Ch. 212; (1905) 1 Ch. 1; 74 L. J. Ch. 55 (Absorbine); *Philippart* v. *William Whiteley*, (1908) 2 Ch. 274; 77 L. J. Ch. 650 (Diabolo); *Re Orlwoola*, (1909) 25 T. L. R. 695; *Re Société Le Ferment*, (1912) 81 L. J. Ch. 724; 29 R. P. C. 497 (Lactobacilline).

(*i*) *Re Compagnie des Pétroles*, (1907) 2 Ch. 435; 76 L. J. Ch. 646; *Re Colgate*, (1913) 29 T. L. R. 326.

(*k*) *Re Lea*, (1913) 1 Ch. 446; 82 L. J. Ch. 240; *Re Bentz*, (1913) 108 L. T. 589: but a geographical name or a surname may be registered under (5). See *Re National Starch Co.*, (1908) 2 Ch. 698; 78 L. J. Ch. 34; *Re Californian Fig Syrup Co.*, (1910) 1 Ch. 130; 79 L. J. Ch. 211; *Re Teofani*, (1913) 82 L. J. Ch. 490; 2 Ch. 545; and see s. 44.

(*l*) See *Re National Starch Co.*, (1908) 2 Ch. 698; 78 L. J. Ch. 34; *Re Whitfield's Bedsteads*, (1909) 2 Ch. 373; 78 L. J. Ch. 677; *Re Joseph Crosfield*, (1910) 1 Ch. 130, 141; 79 L. J. Ch. 211; *Re Gramophone Co.*, (1910) 2 Ch. 423; 79 L. J. Ch. 658; *Re Cassella & Co.*, (1910) 2 Ch. 240; 79 L. J. Ch. 529.

(*m*) An ordinary laudatory epithet such as "Perfection" cannot

In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user (*n*) has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered.

Restrictions on registration.

Except by order of the Court, or in the case of trade marks in use before the 13th of August, 1875, no trade mark can be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive (*o*). Nor is it lawful to register as a trade mark or part of a trade mark any matter the use of which would by reason of its being calculated to deceive (*p*) or otherwise, be disentitled to protection in a Court of Justice or would be contrary to law or morality (*q*).

Concurrent user of same trade mark.

In case of honest concurrent user or of other special circumstances, the Court may permit the registration of the same trade mark, or of nearly identical trade marks for the same goods or description of goods by more than one proprietor (*r*).

Trade mark must be registered for particular goods.

A trade mark must be registered in respect of particular goods or classes of goods (*s*), and it is restricted to the goods in connection with which it is going to be used (*t*). Registra-

be registered as a trade mark. See *Re Joseph Crosfield*, (1910) 1 Ch. p. 142; 79 L. J. Ch. 211. As to when words of dead languages can be registered as trade marks, see *Re Aktiebolaget Hjorth*, (1910) 2 Ch. 64; 79 L. J. Ch. 448 ("Primus").

(*n*) *I.e.*, as a trade mark, *Re Gramophone Co.*, (1910) 2 Ch. p. 433; 79 L. J. Ch. p. 663.

(*o*) Trade Marks Act, 1905, s. 19. See *Eno* v. *Dunn*, 15 A. C. p. 257; *Re Capsuloid Co.*, (1906) 23 R. P. C. 782; *Re Compagnie Industrielle des Pétroles*, (1907) 2 Ch. 435; 76 L. J. Ch. 646; *Re Albert Baker & Co.*, (1908) 2 Ch. p. 107; 77 L. J. Ch. p. 477; *Re Gutta Percha and India Rubber Co.*, (1909) 2 Ch. 10; 78 L. J. Ch. 427.

(*p*) See *Re Compagnie Industrielle des Pétroles; Re Albert Baker & Co., supra; Re McGlennon*, (1908) 25 R. P. C. 797; *Re Gutta Percha and India Rubber Co., supra; Re Georg Schicht Actien Gesellschaft*, (1912) 28 T. L. R. 375; *Re Van der Leeuw*, (1912) 1 Ch. 40; *Andrew* v. *Kucharick*, (1913) 29 T. L. R. 771.

(*q*) Trade Marks Act, 1905, s. 11.

(*r*) *Ib.*, s. 21.

(*s*) *Ib.*, s. 8.

(*t*) *Re Edwards' Trade Mark*, 30 C. D. p. 470; 55 L. J. Ch. 125; *Hargreaves* v. *Freeman*, (1891) 3 Ch. 39; 61 L. J. Ch. 23.

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tion cannot be made in respect of goods in which the applicant does not deal or intend to deal (*u*).

Rectification of register.

The Court may also on the application of any person aggrieved by the non-insertion in or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by any error or defect in any entry in the register, make such order for making, expunging, or varying such entry as the Court thinks fit (*x*). But no trade mark which is upon the register at the commencement of the Trade Marks Act, 1905, and which under the Act is a registrable trade mark shall be removed from the register on the ground that it was not registrable under the Acts in force at the date of its registration (*y*).

Trade marks registered under old Acts.

Name.

The principle which applies to the case of a man selling his goods as the goods of another applies to the case of a man using the name of another for the purpose of reaping the benefit of the reputation which that other has already acquired in the market. A man has a right, so long as he acts honestly, to sell goods under his own name, although another may have been long selling the same class of goods under the same name, and although the goods, as associated with his name, may have acquired a reputation in the market (*z*). So also a man who has carried on a business in his own name and acquired a reputation and a goodwill on his own account under that name, may, by selling the goodwill of his business to a company, confer upon the company the right to use his name as incidental to the goodwill (*a*), but a man who has not been carrying on business on his own account and who transfers

(*u*) *Batt* v. *Dunnett*, (1899) A. C. 428; 68 L. J. Ch. 557.

(*x*) Trade Marks Act, 1905, s. 35.

(*y*) *Ib.*, s. 36. See *Re Gesteltner*, (1908) 1 Ch. 513; 77 L. J. Ch. 299.

(*z*) *Turton* v. *Turton*, 42 C. D. 128; 58 L. J. Ch. 677; *Chivers* v. *Chivers*, 17 R. P. C. 420; *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, (1907) A. C. 430; *Actien Gesellschaft Hommel Haematogen* v. *Hommel*, (1912) 29 R. P. C. 378; 56 S. J. 399; *Kingston, Miller & Co.* v. *Thomas Kingston & Co.*, (1912) 1 Ch. 575, 581; 28 T. L. R. 246; *John Brinsmead & Sons* v. *Stanley Brinsmead*, (1913) 29 T. L. R. 237.

(*a*) *Kingston, Miller & Co.* v. *Thomas Kingston & Co.*, (1912) 1 Ch. p. 581; 28 T. L. R. 246.

no business and goodwill cannot give a company the right to use his name as part of their title, if the use of his name is calculated to mislead the public and injure another person carrying on business under the same name (*b*). The mere user by a man of his own name is of itself no evidence of fraud, but there may be other elements in the case showing that the name has been fraudulently used for the purpose of leading the public to believe that they are buying goods manufactured by another man, and so reaping the benefit of the reputation which another has already acquired. It is in each case a matter of evidence whether or not the user of the name has been fraudulent (*c*). If a man manufactures and sells an article under a name that is not his own, but is the name under which another person sells the same article, or if he changes his name and assumes another and sets up business in the neighbourhood of a person who has long carried on the same business under the name which he has assumed, fraud will be, as a general rule, presumed (*d*).

Use of man's own name.

Where a personal name has become so identified by use in a well-known business with a particular trade as to be necessarily deceptive when used without qualification by any one else in the same trade, another trader of the same name will be restrained from using the name in the same trade without taking reasonable precautions to prevent his goods being con-

(*b*) *Fine Cotton Spinners Association* v. *Harwood, Cash & Co.*, (1907) 2 Ch. p. 190; 76 L. J. Ch. 670.

(*c*) *Rodgers* v. *Nowill*, 6 Hare, 325; 77 R. R. 125; *Holloway* v. *Holloway* 13 Beav. 209; 88 R. R. 463; *Burgess* v. *Burgess*, 3 De G. M. & G. 896; 22 L. J. Ch. 675; *Churton* v. *Douglas*, John. 174; 28 L. J. Ch. 841; 123 R. R. 56; *Turton* v. *Turton*, 42 C. D. 128; 58 L. J. Ch. 677; *Joseph Rodgers & Sons* v. *Joseph Rodgers Simpson*, (1906) 23 R. P. C. 297; *Alexander Dickson & Sons* v. *Alexander Dickson*, (1909) 1 I. R. 185.

(*d*) *Burgess* v. *Burgess*, 3 De G. M. & G. 896; 22 L. J. Ch. 675; *Massam* v. *Thorley's Cattle Food Co.*, 14 C. D. 748; 28 W. R. 966; *Fulwood* v. *Fulwood*, (1873) W. N. 93, 185; *Reddaway* v. *Banham*, (1896) A. C. p. 211, 212; 65 L. J. Q. B. p. 387; *Pinet et Cie* v. *Maison Louis Pinet*, (1898) 1 Ch. 181; 67 L. J. Ch. p. 44; *Valentine Meat Juice Co.* v. *Valentine Extract Co.*, 83 L. T. 259; 16 T. L. R. 522; *Rigden* v. *Jone*[illegible] (1905) 22 R. P. C. 417; *Joseph Rodgers & Sons* v. *Joseph Rodgers Simpson*, (1906) 23 R. P. C. 297; *Joseph Rodgers & Co.* v. *Hearnshaw*, (1906) 23 R. P. C. 349; *Ash* v. *Invicta Manufacturing Co.*, (1911) 28 R. P. C. pp. 264, 607; (reversed on the facts, p. 597).

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founded with the other person's goods which have become identified with the name (*e*).

Name of house.

Apart from a business of some kind, no exclusive right can be acquired in the name of a house, any more than in the name of a person; and no right of action arises from the annoyance occasioned by a person re-naming his residence after the neighbouring residence of another householder (*f*).

Name of newspaper.

Nor is there in law any monopoly in the name of a newspaper. To entitle the owner of a newspaper to an injunction restraining the publication of another newspaper with a similar name the plaintiff must show that the use of the name is calculated to lead the public to believe that the defendant's paper is the plaintiff's, and that the use of such name is injurious to the plaintiff (*g*).

Trade name or partnership style.

The same principles which apply to the right to use a name are also applicable to the use of a trade name or partnership firm or style. If the use of a partnership firm or style be *bonâ fide*, the Court will not interpose; but if there be evidence to show that the name has been taken for the purpose of having the benefit of the reputation which another has acquired in the market, there is a case of fraud (*h*).

Where a man has established a trade and carries it on under a given name, there is fraud if another trader assumes the same name or the same name with a slight variation in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given the reputation to the name (*i*). But a man is not debarred from using

(*e*) *Cash* v. *Cash*, (1902) W. N. 32; 86 L. T. 211.

(*f*) *Day* v. *Brownrigg*, 10 C. D. 294; 48 L. J. Ch. 173; *Street* v. *Union Bank of Spain and England*, 30 C. D. 156; 55 L. J. Ch. 31.

(*g*) *Outram* v. *London Evening Newspapers Co.*, (1911) 27 T. L. R. 231; 55 S. J. 255; *Ridgway* v. *Amalgamated Press*, (1912) 28 T. L. R. 149 ("Everybody's Magazine," "Everybody's Weekly"); *William Stevens & Co.* v. *Cassell & Co.*, (1913) 29 T. L. R. 272; 30 R. P. C. 199 ("Magazine of Fiction").

(*h*) *Croft* v. *Day*, 7 Beav. 84; *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, 4 R. P. C. 215; *Joseph Rodgers & Sons* v. *Joseph Rodgers Simpson*, (1906) 23 R. P. C. 297.

(*i*) *Lee* v. *Haley*, 5 Ch. p. 161; 39 L. J. Ch. 284; *Hoby* v. *Grosvenor Library*, 28 W. R. 386; *Boulnois* v. *Leake*, 13 C. D. 513, n.; *Pinet et Cie* v. *Maison Louis Pinet*, (1898) 1 Ch. 179; 67 L. J. Ch. 41; *Valentine Meat Juice Co.* v. *Valentine Extract Co.*, 17 R. P. C. 673; 83 L. T. 259.

as a trade name a style which is descriptive of his business, so long as he does not assume the name for the purpose of passing off his goods as being the goods of another man, and there is no strong probability of deception (*k*). A man, for instance, who sold coals at a guinea a ton was held entitled to call his shop a guinea coal company, although another trader had for some time previously used that name in the designation of his business, so long as he did not use the name with the intention of deceiving the public (*l*).

Trade name of a company

A company is entitled to an injunction to restrain the registration of an intended company, intended to carry on a similar business under a name so like its own as to be calculated to deceive the public (*m*); and if such a company has been registered, to restrain it from carrying on business under such name (*n*).

On an application by a company registered under the Companies Acts to restrain the registration of a new company with a name so nearly resembling that of the old company as to be calculated to deceive, the Court will ascertain what business has been or is intended to be carried on by the old company, and what is intended to be carried on by the new com-

(*k*) *Lee* v. *Haley*, 5 Ch. 155; 39 L. J. Ch. 284; *Civil Service Supply Association* v. *Dean*, 13 C. D. 512; and see *Borthwick* v. *Evening Post*, 37 C. D. 449; 57 L. J. Ch. 406; *Ridgway* v. *Amalgamated Press Co.*, (1912) 28 T. L. R. 149; 29 R. P. C. 130; *Nugget Polish Co.* v. *Harboro' Rubber Co.*, (1912) 29 R. P. C. 133.

(*l*) *Lee* v. *Haley*, 5 Ch. 155; 39 L. J. Ch. 284.

(*m*) Companies (Consolidation) Act, 1908, s. 8; *Tussaud* v. *Tussaud*, 44 C. D. 678; 59 L. J. Ch. 631; *Fine Cotton Spinners Association* v. *Harwood*, (1907) 2 Ch. p. 190; 76 L. J. Ch. 670; and see *Hendricks* v. *Montagu*, 17 C. D. 638; 50 L. J. Ch. 456, where an unregistered company was granted an injunction.

(*n*) *Manchester Brewery* v. *North Cheshire, &c., Co.*, (1898) 1 Ch. 539; 67 L. J. Ch. 351; (1899) A. C. 83; 68 L. J. Ch. 74; *Panhard et Levassor Co.* v. *Panhard Motor Co.*, (1901) 2 Ch. 513; 70 L. J. Ch. 738; *Fine Cotton Spinners Association* v. *Harwood, Cash & Co.*, (1907) 2 Ch. p. 190; 76 L. J. Ch. 670; *Standard Bank of South Africa* v. *Standard Bank*, (1909) 26 R. P. C. 310; 25 T. L. R. 426; *Ouvah Ceylon Estates Co.* v. *Uva Ceylon Rubber Co.*, (1910) 103 L. T. 416, 417; 27 T. L. R. 24; *Lloyds Bank* v. *Lloyds Investment Co.*, (1912) 28 T. L. R. 379; *Kingston, Miller & Co.* v. *Thomas Kingston & Co.*, (1912) 1 Ch. 578; 28 T. L. R. 246; *Lloyd's and Dawson Bros.* v. *Lloyds Southampton*, (1912) 28 T. L. R. 338; 56 S. J. 361; *Facsimile Letter Printing Co.* v. *Facsimile Typewriting Co.*,

pany, and what sort of name has been adopted by the old company (*o*). A company cannot merely by registering as its title a word in common use at the date of registration and which represents an article of commerce, claim a monopoly of the word so as to prevent another company taking the word as part of its name (*p*).

The question is whether the name adopted by the new company for a business of the same kind is so like the name of the old company, which they have for some time used as a trade name, as in fact to enable the new company to appropriate a material part of the business of the old company (*q*). It must however be shown that there is a reasonable probability of damage to the old company's business; mere similarity of name is not alone sufficient (*r*).

In deciding the question, the principles to be applied by the Court are analogous to those which govern the Court in ordinary cases of passing off (*s*).

Reference by ex-employee to former employment.

A man who has been in the employment of a firm of reputation and who sets up a business of a similar character, is entitled, unless he has contracted not to do so, to inform the public that he has been in such employment; but in so doing he must take care that it be not done in such a way as to lead to the belief that he is carrying on the business or a branch of the business of his late employer (*t*). A trader will be

(1912) 29 R. P. C. 557; and see *Toms* v. *Merchant Service Guild, Ld.*, (1908) 25 R. P. C. 474 (plaintiffs an unincorporated society).

(*o*) *Aerators, Ltd.* v. *Tollitt*, (1902) 2 Ch. 319; 71 L. J. Ch. 727. See *Scottish Union and National Insurance Co.* v, *Scottish National Insurance Co.*, (1909) S. C. 318, where an injunction was refused, the plaintiffs carrying on general insurance business, and the defendants marine insurance.

(*p*) *Aerators, Ltd.* v. *Tollitt, supra.*

(*q*) *Hendriks* v. *Montagu*, 17 C. D. 638; 50 L. J. Ch. 456; *Guardian Fire and Life Insurance Co.* v. *Guardian and General Insurance Co.*, 50 L. J. Ch. 253; *Accidental Insurance Co.* v. *Accidental Disease, &c., Co.*, 54 L. J. Ch. 104; *Elliott* (*Trade Extension Co.*) v. *Expansion of Trade, Ltd.*, (1910) 27 R. P. C. 54.

(*r*) *General Reversionary and Investment Co.* v. *General Reversionary Co.*, 1 Meg. 65. See *Electromobile Co.* v. *British Electrobile Co.*, (1907) 98 L. T. 258; 24 T. L. R. 192; *Royal Insurance Co.* v. *Midland Insurance Co.*, (1909) 26 R. P. C. 95.

(*s*) *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.*, (1907) 2 Ch. 320; 76 L. J. Ch. 511.

(*t*) *Glenny* v. *Smith*, 2 Dr. & Sm. 476; 13 L. T. 11; *Hookham* v.

False representation of succession to business or of agency.

restrained from falsely holding himself out as being in business with another trader, or from issuing circulars tending to lead the public to suppose that another trader has retired from business and that he has succeeded to the business (*u*), or from falsely representing that he is an agent for a manufacturer (*x*).

Trade name of article.

Where a name or word was originally or has become descriptive of an article, it cannot be protected as a trade name. If a person who invents a process for making a new article invents at the same time a new name for describing such article and the article comes to be known in the market by that name only, the right to the use of the word or name is *publici juris* (*y*). Where, for example, the inventor of a new substance has given it a name and, having taken out a patent for the invention, has during the continuance of the patent alone made and sold the substance by that name he is not entitled to the exclusive use of the name after the patent has expired (*z*).

Incorporated accountant.

In a recent case (*a*) the Court held that the term "incor-

Pottage, 8 Ch. 95; 21 W. R. 47; *Coudey* v. *Lerwill*, (1908) 99 L. T. 273; 24 T. L. R. 584.

(*u*) *Harper* v. *Pearson*, 3 L. T. 547; *Scott* v. *Scott*, 16 L. T. 143; *Massam* v. *Thorley's Food for Cattle Co.*, 14 C. D. 748; 28 W. R. 966; *Dence* v. *Mason*, 41 L. T. 573; *Melachrino* v. *M.*, 4 R. P. C. 215; *Van Oppen & Co.* v. *Leonard Van Oppen*, (1903) 20 R. P. C. 617.

(*x*) *Wheeler and Wilson Manufacturing Co.* v. *Shakespear*, 39 L. J. Ch. 37.

(*y*) See *Cellular Clothing Co.* v. *Maxton and Murray*, (1899) A. C. 326; 68 L. J. P. C. 72; *Society of Accountants and Auditors* v. *Goodway*, (1907) 1 Ch. pp. 497, 498; 76 L. J. Ch. p. 387.

(*z*) *Linoleum Manufacturing Co.* v. *Nairn*, 7 C. D. 834; 47 L. J. Ch. 430; *Re Ralph*, 25 C. D. 194; 53 L. J. Ch. 188; *Re Leonard and Wells Trade Mark*, 26 C. D. p. 303; 53 L. J. Ch. 602; *Native Guano Co.* v. *Sewage Manure Co.*, 8 R. P. C. 125; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. p. 80; 65 L. J. Ch. 563; (1897) A. C. 717; 66 L. J. Ch. 763; *Re Gestetner's Trade Mark*, (1908) 2 Ch. 513; 77 L. J. Ch. 299; *Re Bowden's Trade Mark*, (1909) 26 R. P. C. 209; *Edge* v. *Niccolls*, (1911) A. C. p. 702; 80 L. J. Ch. 745.

(*a*) *Society of Accountants and Auditors* v. *Goodway and London Association of Accountants*, (1907) 1 Ch. 489; 76 L. J. Ch. 384, following *Society of Accountants in Edinburgh* v. *Corporation of Accountants*, (1893) S. C. 750, where defendants were restrained from using the initials C. A.

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porated accountant" was a fancy and not a descriptive term and that it had come to denote membership of the plaintiff society, and that the unauthorised use of the term was an injury to the plaintiff society, and an injunction was accordingly granted restraining a member of the defendant association from using the term in connection with his business of accountant, and the defendant association from holding out or representing that its members were entitled to use the term. In a later case, however (*b*), the Court refused to restrain an architect who was not a member of the plaintiff society of architects from using for professional purposes the letters M.S.A.

Society of Architects, M.S.A.

Trade name associated with goods of particular person.

A trade name may be so appropriated by user as to come to mean the goods of a particular person, though it is not and never was impressed on the goods or the packages in which they are contained so as to be a trade mark properly so called or within the Statute. Where it is established that such a trade name bears that meaning, the use of that name or of one so nearly resembling it as to be likely to deceive as applicable to goods, not the plaintiff's, may be the means of passing off those goods as and for the plaintiff's just as much as the use of a trade mark (*c*). But where a name or word was originally or has become descriptive of the article to which it is attached, so that while indicating what the article is, it does not connect that article with any particular manufacturer, and there has been no such appropriation by user or reputation as to cause that word to mean in the market the goods of any particular manufacturer, the word cannot be protected as a trade name (*d*).

(*b*) *Society of Architects* v. *Kendrick*, (1910) 102 L. T. 526; W. N. 113.

(*c*) *Singer Manufacturing Co.* v. *Loog*, 8 A. C. 32; 52 L. J. Ch. 481; *Reddaway* v. *Banham*, (1896) A. C. 199; 65 L. J. Q. B. 381; *Birmingham Vinegar Brewery Co.* v. *Powell*, (1897) A. C. 711; 66 L. J. Ch. 763; *Faulder* v. *Rush*, (1903) 19 T. L. R. 452; *Rigden* v. *Jones*, (1905) 22 R. P. C. 417; *Brock & Co.'s "Crystal Palace" Fireworks Co.* v. *James Pain & Sons*, (1912) 105 L. T. 976.

(*d*) *Schove* v. *Schminke*, 33 C. D. 547; 55 L. J. Ch. 892; *Borthwick* v. *Evening Post*, 37 C. D. 449; 57 L. J. Ch. 406; *Goodfellow* v. *Prince*, 35 C. D. 19; 56 L. J. Ch. 545; *Fels* v. *Halley*, (1903) 21 R. P. C. 91; 20 T. L. R. 69; *Burberry's* v. *Cording & Co.*, (1909) 26 R. P. C.

Unauthorised use of Royal Arms.

An injunction will be granted to restrain a person without the authority of His Majesty from using in connection with his trade, business, calling, or profession the Royal Arms (or arms so closely resembling the same as to be calculated to deceive) in such manner as to be calculated to lead the public to believe that he is duly authorised so to use the Royal Arms; or without the authority of His Majesty or of a member of the Royal Family using in connection with his trade, business, calling or profession any device, emblem or title in such manner as to be calculated to lead to the belief that he is employed by or supplies goods to His Majesty or such member of the Royal Family (*e*). Proceedings may be taken by any person who is authorised to use such arms or such device, emblem, or title, or who is authorised by the Lord Chamberlain to take the proceedings (*e*).

Assignment of trade mark.

A trade mark cannot be assigned or devolve in gross; an assignment therefore is inoperative if the assignor has no goodwill to assign (*f*). Upon the sale of a business the right to both trade marks and trade names used in the business passes with the goodwill of the business to the successors of the firm that originally established them, without any express mention being made of them in the deed of assignment (*g*), unless a contrary intention appears (*h*).

A trade mark, when registered, can be assigned and transferred only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and is determinable with that goodwill (*i*). If the trade mark which has been assigned be in

p. 701; *Thorne* v. *Sandow & Co.*, (1912) 29 R. P. C. 440.

(*e*) Trade Marks Act, 1905, s. 68. See *Royal Warrant Holders Association* v. *Slade*, (1908) 25 R. P. C. 245; *Royal Warrant Holders Association* v. *Wilson*, (1909) 26 R. P. C. 157; *Royal Warrant Holders Association* v. *Deane, Beal & Co.*, (1912) 1 Ch. 10; 81 L. J. Ch. 67 (where the form of order is discussed). As to the unauthorized use of the emblem of the Red Cross, see 1 & 2 Geo. 5, c. 20.

(*f*) See *Harness' Trade Mark*, 17 R. P. C. 40; *Ullman & Co.* v. *Leuba*, (1908) A. C. p. 446; 78 L. J. P. C. 41.

(*g*) *Bury* v. *Bedford*, 4 De G. J. & S. 372; 33 L. J. Ch. 465; *Shipwright* v. *Clements*, 19 W. R. 599.

(*h*) *Rogers' Trade Mark*, 12 R. P. C. 149.

(*i*) Trade Marks Act, 1905, s. 22.

respect of an entire class of articles but the articles dealt with in the business which has been assigned form part only of the class, the assignee is not entitled to the exclusive user of the trade mark, but only to the user of it for the particular class of articles in connection with which it has been actually used (*k*).

Right to trade name on assignment of goodwill of business.

A man who has assigned the goodwill of a business may, unless precluded by covenant, set up the same business in the immediate neighbourhood, and may publish or advertise the fact of his having done so, but he may not trade under the old name, or solicit his old customers (*l*), even although they have of their own accord continued to deal with him (*m*); and he has no right to use the trade marks which were the marks of that business (*n*), or by the use of the name or title of the firm to represent himself as carrying on the business which he has sold (*o*).

So if the trustee in bankruptcy of a trader sells the goodwill and trade marks of the bankrupt's business, the bankrupt has no right to continue to use the marks (*p*) or to represent that he is still carrying on the business, but he is not a grantor so as to be bound by the rule not to solicit customers as laid down in *Trego* v. *Hunt* (*q*).

The purchaser of a business though he is entitled, in the absence of any special contract in the deed of assignment, to

See *Re Welcome's Trade Mark*, 32 C. D. 213; 55 L. J. Ch. 542; *Rey* v. *Lecouturier*, (1908) 2 Ch. p. 733; 78 L. J. Ch. p. 190; (1910) A. C. p. 270; 79 L. J. Ch. p. 400.

(*k*) *Re Edward's Trade Mark*, 30 C. D. 455; 55 L. J. Ch. 125. See *Re Hart's Trade Mark*, (1902) 2 Ch. 621; 71 L. J. Ch. 869.

(*l*) *Vernon* v. *Hallam*, 34 C. D. 748; 56 L. J. Ch. 115; *Trego* v. *Hunt*, (1896) A. C. 7; 65 L. J. Ch. 1; *Jennings* v. *Jennings*, (1898) 1 Ch. 378; 77 L. T. 786; *Gillingham* v. *Beddow*, (1900) 2 Ch. 242; 69 L. J. Ch. 527. An expelled partner may solicit (*Dawson* v. *Beeson*, 22 C. D. 504; 52 L. J. Ch. 563).

(*m*) *Curl Bros.* v. *Webster*, (1904) 1 Ch. 685; 73 L. J. Ch. 540.

(*n*) *Bury* v. *Bedford*, 4 De G. J. & S. 373; 33 L. J. Ch. 465; *Shipwright* v. *Clements*, 19 W. R. 599.

(*o*) *Churton* v. *Douglas*, John. 174; 28 L. J. Ch. 841; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Pomeroy* v. *Scalé*, (1907) 23 T. L. R. 170; 24 R. P. C. 185.

(*p*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Hammond* v. *Brunker*, 9 R. P. C. 301.

(*q*) *Walker* v. *Mottram*, 19 C. D 355; 51 L. J. Ch. 108.

the use of the trade name of the business (*r*), must not use it in such a way as to lead ordinary persons to believe that the vendor is still carrying on the business (*s*) or so as to expose the vendor to liability (*t*).

Rights of partner in trade marks.

Upon the formation of a partnership firm, a trade mark, to which one of the partners may be entitled, becomes, in the absence of any stipulation to the contrary, part of the partnership property (*u*). So also where a new partner comes into the partnership firm, amongst other rights which he purchases by coming into the firm is the right to use the trade name or trade marks belonging to the firm (*x*).

On dissolution of partnership trade marks part of assets.

On the dissolution of a partnership, in the absence of special agreement, the trade marks of the firm are part of its assets and are saleable as such with the goodwill (*y*). Where there is no sale it seems that each of the partners is at liberty to make use of the trade name of the firm and of its trade marks, provided he can and does do so in such a way as to avoid deceiving the public or casting any risk or liability upon his late partners (*z*).

Right of an author or publisher in the title of his book.

A publisher or author has in the title of his book or in the application of his name to the book, or in the particular marks which designate it, a species of property similar to that which a trader has in his trade mark, and may like a trader claim the

(*r*) *Levy* v. *Walker*, 10 C. D. 448; 48 L. J. Ch. 273; *Re David and Matthews*, (1899) 1 Ch. p. 384; 67 L. J. Ch. 185; *Pomeroy* v. *Scalé*, (1907) 23 T. L. R. 170; 24 R. P. C. 185.

(*s*) *Chatteris* v. *Isaacson*, 56 L. T. 177; *Townsend* v. *Jarman*, (1900) 2 Ch. 698; 69 L. J. Ch. 823. See *Pomeroy* v. *Scalé*, *supra*.

(*t*) *Thynne* v. *Shove*, 45 C. D. 577; 59 L. J. Ch. 509; *Townsend* v. *Jarman*, (1900) 2 Ch. 698; 69 L. J. Ch. 823.

(*u*) *Bury* v. *Bedford*, 4 De G. J. & S. 374; 33 L. J. Ch. 465.

(*x*) *Singer Manufacturing Co.* v. *Wilson*, 2 C. D. 455; 45 L. J. Ch. 491.

(*y*) *Hall* v. *Barrows*, 4 De G. J. & S. 150; 33 L. J. Ch. 204; *Levy* v. *Walker*, 10 C. D. 436; 48 L. J. Ch. 273; *David* v. *Matthews*, (1899) 1 Ch. p. 382; 67 L. J. Ch. 185; *Hill* v. *Fearis*, (1905) 1 Ch. 466; 74 L. J. Ch. 237. See *Att.-Gen.* v. *Boden*, (1912) 1 K. B. p. 55; 81 L. J. K. B. p. 709.

(*z*) *Hookham* v. *Pottage*, 8 Ch. 91; 21 W. R. 47; *Thynne* v. *Shove*, 45 C. D. 577; 59 L. J. Ch. 509; *Burchell* v. *Wilde*, (1900) 1 Ch. 551; 69 L. J. Ch. 314. As to the apportionment of trade marks on the dissolution of a partnership, see Trade Marks Act, 1905, s. 23.

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protection of the Court against such a use or imitation of the name, marks, or designation, as is likely in the opinion of the Court to mislead the public and cause damage to him in respect of that property; but as a general rule there is no copyright in such titles (*a*).

Newspapers.

A publisher or newspaper proprietor who comes to the Court for an injunction to restrain any other person from taking the same name or title for any similar publication must be able to establish satisfactorily by distinct evidence that such name or title has come by general acceptance and reputation in the market to denote exclusively the book or newspaper published by him, so that purchasers when they buy the publication under that name or title believe they are buying the plaintiff's publication (*b*), and that the assumption of the name is calculated to deceive the public, and that there is a probability of the plaintiff being injured thereby (*c*).

Rights of an author or publisher in the title of his work.

A man has a full right to publish a similar work under the same title as that of another, if the title is a mere hackneyed phrase long in common use (*d*), or if he represents his work as distinct and original; but he may not without authority advertise his own work as the continuation of another as being in connection with another (*e*).

A man cannot by advertising his intention of publishing a periodical under a certain name and making preparations fo

(*a*) *Spottiswoode* v. *Clarke*, 2 Ph. 154; 78 R. R. 63; *Chappell* v. *Davidson*, 8 De G. M. & G. 1; 114 R. R. 1; *Maxwell* v. *Hogg*, 2 Ch. 307; 36 L. J. Ch. 133; *Dicks* v. *Yates*, 18 C. D. 76, 89; 50 L. J. Ch. 809; *Crotch* v. *Arnold*, (1909) 54 S. J. 49; *Brarmet* v. *Meyer*, (1913) 29 T. L. R. 149 (play); and see Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, ss. 1 (1), (2).

(*b*) *Kelly* v. *Byles*, 13 C. D. 682; 49 L. J. Ch. 181; *Schove* v. *Schminke*, 33 C. D. 546; 55 L. J. Ch. 892; *Licensed Victuallers' Newspaper Co.* v. *Bingham*, 38 C. D. 139; 58 L. J. Ch. 36; *Outram* v. *London Evening Newspaper Co.*, (1911) 27 T. L. R. 231; 28 T. L. R. C. 30[illegible]

(*c*) *[illegible]* v. *Evening Post*, 37 C. D. [illegible] *Bingham* v. *London* [illegible] *supra*.

(*d*) *[illegible]* v. 50 L. [illegible] v. *Am[illegible]nal* [illegible] T. L. R. 49; *Steven[illegible]* Co., (1913) 29 T. L. Copyright Act, 1911, 1 & c. 46, s. [illegible], (2).

(*e*) *Ho[illegible]* v. *Kirby*, 8 Ves. 215; 7 R. R. 3[illegible] *Borthwick Evening Post*, 37 [illegible] 449; 57 L. J. Ch. 406.

issuing it acquires a right to the exclusive use of the name, the periodical not having appeared before the bringing of the action (*f*).

The name of the editor is not a necessary part of the title of a newspaper, and in the absence of any special contract to that effect the Court will not restrain the owners of a journal from publishing it without the name of the editor (*g*).

Abandonment of trade mark.

The right to a trade mark may be lost by abandonment, but to constitute an abandonment an intention to abandon must be shown, and the non-user of a trade mark is not sufficient to constitute abandonment (*h*).

Non-user of trade mark.

Section 37 of the Trade Marks Act, 1905, enacts that a trade mark may be removed on application to the Court of any person aggrieved, by reason of the non-use in respect of any goods for which it is registered, and that it was registered without any *bonâ fide* intention to use the same in connection with such goods, and there has in fact been no *bonâ fide* user of the same in connection therewith, or on the ground that there has been no *bonâ fide* user of such trade mark in connection with such goods during the five years immediately preceding the application, unless in either case such non-user is shown to be due to special circumstances in the trade and to any intention not to use or to abandon the trade mark in respect of such goods (*i*).

Who may sue for infringement.

The plaintiff must be owner of the trade mark (subject to concurrent rights, if any) must prove that he is entitled to its exclusive use (*k*). An action to restrain the infringement of a trade mark with the usual claim for account of profits or damages being an action brought in respect of injury to the property of the owner of the trade mark, it may

(*f*) *Maxwell* v. *Hogg*, 2 Ch. 307; 36 L. J. Ch. 433.

(*g*) *Crookes* v. *Petter*, 6 Jur. N. S. 131.

(*h*) *Mouson* v. *Boehm*, 26 C. D. 398; 53 L. J. Ch. 932. Cf. *Re Ralph*, 25 C. D. 198; 53 L. J. Ch. 188; *Daniel* v. *Whitehouse*, (1893) 1 Ch. 685; 67 L. J. Ch. 262.

(*i*) See *Anglo-Swiss Milk Co.* v. *Pearks*, (1904) 21 R. P. C. 261; *Philippart* v. *Whiteley*, (1908) 2 Ch. pp. 285, 286; 77 L. J. Ch. 650; *Re Smollen's Trade Mark*, (1912) W. N. 35; 29 R. P. C. 158.

(*k*) *Robinson* v. *Finlay*, 9 C. D. 487. See *Warwick Tyre Co.* v. *New Motor Co.*, (1910) 1 Ch. 249; 79 L. J. Ch. 177.

be continued after his death by his personal representatives (*l*).

It has been held that when a trade mark has been properly registered, the assignee of the registered proprietor can bring an action to prevent infringement without having registered the assignment (*m*). But this decision seems to conflict with a later case (*n*).

Tenants in common.

Where two or more persons are tenants in common in a trade mark, each of them has a right to sue alone in respect of the wrong done to himself (*o*), and several plaintiffs so entitled may join in one action, although their interests are distinct and separate (*p*).

Foreign manufacturer.

A foreign manufacturer may bring an action to restrain the illegal user in this country of his trade mark and also for damages or an account (*q*). An action may also be brought in this country to restrain the export to a foreign port of goods fraudulently impressed with the plaintiff's mark (*r*). The Registration Acts make the registration of a trade mark by a foreigner a condition precedent to his right to sue (*s*).

Importers.

A mere importer cannot sue for infringement of the trade marks of the consignor or producer (*t*). Nor can the purchaser of a trader's goods with the exclusive right of sale in a particular district, sue for the infringement of the trader's marks (*u*). But exclusive agents for sale who sell the goods of their manufacturer under their own get-up, can maintain an action to restrain the imitation of their get-up (*x*).

Exclusive agents for sale.

(*l*) *Oakey* v. *Dalton*, 35 C. D. 700; 57 L. T. 18.

(*m*) *Ihlee* v. *Henshaw*, 31 C. D. 323; 55 L. J. Ch. 273.

(*n*) *Magnolia Co.* v. *Atlas Co.*, 14 R. P. C. 389; and see s. 42 of the Trade Marks Act, 1905.

(*o*) *Dent* v. *Turpin*, 2 J. & H. 139; 30 L. J. Ch. 495; *Batty* v. *Hill*, 1 H. & M. 270.

(*p*) *Magnolia Co.* v. *Atlas Co.*, 14 R. P. C. 389; *Universities of Oxford and Cambridge* v. *Gill*, (1899) 1 Ch. 55; 68 L. J. Ch. 34.

(*q*) *Siegert* v. *Findlater*, 7 C. D. 801; 47 L. J. Ch. 233.

(*r*) *Johnston* v. *Orr-Ewing*, 7 A. C. 219; 51 L. J. Ch. 797.

(*s*) *Goodfellow* v. *Prince*, 35 C. D. 9; 56 L. J. Ch. 545. See Trade Marks Act, 1905, s. 42, and Patents and Designs Act, 1907, s. 91.

(*t*) *Hirsch* v. *Jonas*, 3 C. D. 584; 45 L. J. Ch. 364.

(*u*) *Richards* v. *Butcher*, 7 R. P. C. 288, 291; see *Dental Manufacturing Co.* v. *De Trey & Co.*, (1912) 3 K. B. 76, 86; 81 L. J. K. B. 1162.

(*x*) *Dental Manufacturing Co.* v. *De Trey & Co.*, *supra*.

Who may be sued.

An action for an injunction may be brought against an agent (*y*) or against a person employed in effecting only a part of the transaction, such as a person employed to engrave or print spurious labels or marks (*z*), or against an innocent person, such as a carrier (*a*), a shipowner (*b*), or a wharfinger who may have temporary possession of the articles impressed with a spurious trade mark (*c*). A man who at the desire of another affixes to goods a trade mark which belongs to a third party may be made a party to the action along with his principal (*d*).

Master liable for servant's infringement.

An action for an injunction may also be brought against a master for an infringement of a trade mark by his servant (*e*), and notwithstanding that the servant acted contrary to his master's orders (*f*). But the Court has refused to grant an injunction against an innocent defendant in respect of an isolated case of infringement or of passing off by an over-zealous or careless servant (*g*).

Relief not granted when mark used fraudulently by plaintiff.

The interference of the Court to restrain the piracy of a trade mark being founded on equitable principles (*h*), a trader will not be protected if he is using a deceptive trade mark or if he is using his mark for the purposes of a fraudulent trade (*i*). A trader who falsely leads purchasers to believe that they are buying something different from that

(*y*) *Upmann* v. *Elkan*, 7 Ch. p. 132; 41 L. J. Ch. 246.

(*z*) *Guinness* v. *Ulmer*, 10 L. T. O. S. 127; *Jamieson* v. *Johnston*, 18 R. P. C. 259; *De Kuyper* v. *Bain*, 20 R. P. C. 581.

(*a*) *Upmann* v. *Elkan*, 7 Ch. 130; 41 L. J. Ch. 246.

(*b*) *Apollinaris Co.* v. *Wilson*, 31 C. D. 633; 55 L. J. Ch. 665.

(*c*) *Moet* v. *Pickering*, 8 C. D. 372; 47 L. J. Ch. 527.

(*d*) *Collins* v. *Reeves*, 28 L. J. Ch. 56; 33 L. T. 101; *Collins* v. *Walker*, 7 W. R. 222.

(*e*) *Havana Cigar Co.* v. *Tiffin* (1905), 26 R. P. C. p. 479; *Lever Bros.* v. *Masbro' Equitable Pioneers Society* (1912), 106 L. T. 472.

(*f*) *Munro* v. *Hunter* (1904), 21 R. P. C. 296.

(*g*) *Knight & Sons* v. *Crisp & Co.* (1904), 21 R. P. C. 670; *Montgomerie & Co.* v. *Youngs*, (1904) 21 R. P. C. 285; *Kodak Co.* v. *Grenville* (1908), 25 R. P. C. 419; *Armstrong Oiler Co.* v. *Patent Axlebox, &c. Co.*, (1910) 27 R. P. C. p. 376; *Lever Bros.* v. *Masbro' Equitable Pioneers Society* (1912), 106 L. T. 472.

(*h*) *Maxwell* v. *Hogg*, 2 Ch. 307; 36 L. J. Ch. 433; *Lee* v. *Haley*, 5 Ch. 161; 39 L. J. Ch. 284.

(*i*) *Leather Cloth Co.* v. *American Cloth Co.*, 4 De G. J. & S. 137; 33 L. J. Ch. 199; *Bile Bean Co.* v. *Davidson*, (1905) 22 R. P. C. 553; (1906) 23 R. P. C. 725; *Boake*,

which in fact he is selling, or is guilty of any misrepresentation with respect to his goods as to amount to a fraud upon the public, disentitles himself as against a rival trader to that relief which he would have otherwise obtained (*k*). If a trade mark represents an article as protected by a patent, when in fact it is not so protected, such a statement amounts *primâ facie* to a misrepresentation of an important fact, which would disentitle the owner of the mark to relief against any man who pirated it (*l*). In the case of *Edelsten* v. *Vick* (*m*), Lord Hatherley doubted whether the rule would be the same if there had been originally a patent, and the statement in the trade mark being true when first introduced, had been continued after it had ceased to be true. But there can be no distinction between the cases. If the word "patent" be not so used as to indicate the existing protection of a patent, but merely as part of the designation of an article thrown into the market, nobody is meant to be deceived, and nobody is deceived (*n*). A patent may have expired and be known to have expired fifty years ago, and yet the name of patent may have become attached to the article, and be used in the trade as designating it (*o*). But if the trade mark represents the article as protected by a patent, when in fact it is not so protected, there is no difference whether the protection never existed or has ceased to exist. If the true effect of the trade mark or label be to mislead the public, that is sufficient to

Use of the word "patent."

Roberts & Co. v. *Wayland & Co.*, (1909) 26 R. P. C. p. 257; and see s. 11, Trade Marks Act, 1905.

(*k*) *Pidding* v. *How*, 8 Sim. 477; 6 L. J. Ch. *N.* S. 345; 42 R. R. 231; *Perry* v. *Truefitt*, 6 Beav. 76; 63 R. R. 11; *Leather Cloth Co.* v. *American Cloth Co.*, 11 H. L. C. 523; 35 L. J. Ch. 53; *Lee* v. *Haley*, 5 Ch. 155; 39 L. J. Ch. 284; *Newman* v. *Pinto*, 57 L. T. 31; (1887) W. N. 119; *Cropper Minerva Machine Co.* v. *Cropper*, (1906) 23 R. P. C. p. 394.

(*l*) *Leather Cloth Co.* v. *American Cloth Co.*, 11 H. L. C. p. 543; 35 L. J. Ch. 53; *Flavel* v. *Harrison*, 10 Ha. 467; 22 L. J. Ch. 866; 90 R. R. 435; *Morgan* v. *M'Adam*, 36 L. J. Ch. 228; *Leather Cloth Co.* v. *Lorsont*, 9 Eq. p. 352; 39 L. J. Ch. 86; *Bourke, Roberts & Co.* v. *Wayland & Co.*, (1909) 26 R. P. C. p. 257; cf. *Perry & Co.* v. *Hessin & Co.* (1912), 56 S. J. 176, 572; 29 R. P. C. 101, 509.

(*m*) 11 Ha. p. 87.

(*n*) 11 H. L. C. p. 544.

(*o*) *Marshall* v. *Ross*, 8 Eq. 651; 39 L. J. Ch. 225. See *Cheavin* v. *Walker*, 5 C. D. p. 862; 46 L. J. Ch. 686.

debar the plaintiff from relief (*p*). But the use of the word patent is not to be taken as misleading where either it is shown that the market name of the goods comprises the word or where the goods are made according to an expired patent, and the word is so used as to be understood to refer to this, or where from the nature of the case it is unlikely to mislead (*q*).

Use of firm name by successors in business.

The principle that a misstatement in a trade mark will deprive a man of his right to apply to the Court for relief, does not apply to the case of the use of the name of a firm by successors in business of the original partners. The name of a firm may be used long after all the original partners have died, or have ceased to have any interest in the concern. By the usage of trade the name of a firm is understood not to be confined to those who first adopted it, but to extend to and include persons who have been afterwards introduced as partners, or persons to whom the original partners have transferred their business. The use, therefore, of the old trade name of a firm by the new partners or their successors is no fraud upon the public, but is merely a statement that they are carrying on the same business as was formerly carried on by the person or persons whose name constituted the trade mark (*r*).

The case, however, is different if a trade mark be so completely personal in its nature as necessarily to indicate that the goods to which it is affixed are the manufacture of a particular person. If a person has acquired by his personal skill and ability a reputation which gives his goods in the market a higher value than those of others, there is an imposition on the public, if a man, to whom he has transferred his business, uses his name or trade mark. A man may assign his business to another, but he cannot give him the

(*p*) *Leather Cloth Co.* v. *American Cloth Co.*, 11 H. L. C. p. 544; 35 L. J. Ch. 53; *Cheavin* v. *Walker*, 5 C. D. 850; 46 L. J. Ch. 686; and see *Boake, Roberts & Co.* v. *Wayland & Co.*, (1909) 26 R. P. C. p. 253. Cf. *Hoyward* v. *Lely*, 56 L. T. 419; *Perry & Co.* v. *Hessin & Co.*, (1912) 56 S. J. 176, 572; 29 R. P. C. 101, 509.

(*q*) *Cochrane* v. *Macnish*, (1896) A. C. 225; 65 L. J. P. C. 20. See *Perry & Co.* v. *Hessin & Co.*, *supra*.

(*r*) *Leather Cloth Co.* v. *American Cloth Co.*, 11 H. L. C. p. 542; 35 L. J. Ch. 53. See *Singer Manufacturing Co.* v. *Loog*, 8 A. C. p. 33; 52 L. J. Ch. 481.

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right to use his name or mark, if the effect of the statement be necessarily to indicate that the goods to which it is affixed are the goods of the person whose name and mark they bear, and the value of the goods be materially affected by the statement (*s*). If, however, a trade mark be a mark which refers more closely to the place of manufacture or to the particular business than to the firm of the manufacturer, although it may originally have denoted the person by whom the goods were manufactured, or if it has become a sign of quality, and ceased to denote that a particular person carries on the business, the assignee of the business and business premises is not guilty of a misrepresentation to the public in making use of the mark (*t*). In many cases the name of the first maker of an article is accepted in the market either as a brand of quality or it becomes the denomination of the article itself, and is no longer a representation that the article is the manufacture of any particular person (*u*).

Collateral misrepresentation.

A misrepresentation which is merely collateral must be distinguished from false representation in the trade mark or fraud in the trade itself. Though the Court will not interfere by injunction to restrain the imitation of a trade mark, if there is false representation in the trade mark or if the trade itself is fraudulent, a collateral misrepresentation by the owner of the trade mark will not necessarily disentitle him to relief either at law or in equity (*x*). Where, accordingly, the plaintiff, whose trade mark was "Ford's Eureka Shirts," had falsely represented in his invoices and in a few advertisements that he was "patentee" of the shirt, it was held that such false representation was not sufficient to prevent him from sustaining an action at law; and that his right at law being

(*s*) *Leather Cloth Co.* v. *American Cloth Co.*, 4 De G. J. & S. 137, 143; 33 L. J. Ch. 199; *Bury* v. *Bedford*, 4 De G. J. & S. 352, 369; 33 L. J. Ch. 465. See *Cropper Minerva Machine Co.* v. *Cropper*, (1906) 23 R. P. C. pp. 393, 394.

(*t*) *Bury* v. *Bedford*, 4 De G. J. & S. 352, 369; 33 L. J. Ch. 199.

(*u*) *Hall* v. *Burrows*, 4 De G. J & S. 155; 33 L. J. Ch. 204.

(*x*) *Ford* v. *Foster*, 7 Ch. 611; 41 L. J. Ch. 682; *Perry & Co.* v. *Hessin & Co.*, (1912) 56 S. J. 176; 29 R. P. C. 101; affirmed on appeal on other grounds, 56 S. J. 572; 29 R. P. C. 509.

clear, he was entitled to an injunction (*y*). A misrepresentation which has been corrected and abandoned before the action (*z*), or one made after the commencement of the action (*a*), will not necessarily disentitle the plaintiff to relief.

What degree of resemblance constitutes fraudulent imitation of trade mark.

It is impossible to lay down any general rule as to what degree of resemblance is necessary to constitute a fraudulent or colourable imitation of a trade mark. Each case must be dealt with as it arises, the question being whether there is such a resemblance as that a person of ordinary intelligence with proper eyesight and exercising ordinary caution is likely to be deceived (*b*).

Delay and acquiescence.

The owner of a trade mark who seeks the aid of the Court for the protection of his mark must use due diligence in making the application. Acquiescence or delay may deprive a man of his right to the protection of the Court (*c*).

Delay at the trial.

Mere delay after knowledge of the infringement to take proceedings, not sufficient to call the Statute of Limitations into operation, or where the infringement continues, is not, it seems, a bar to the right to an injunction at the trial (*d*). Lapse of time unaccompanied by anything else is, it seems,

(*y*) *Ford* v. *Foster*, *supra*; cf. *Newman* v. *Pinto*, 57 L. T. 31, W. N. (1887) 119.

(*z*) *Benedictus* v. *Sullivan*, 12 R. P. C. 25.

(*a*) *Siegert* v. *Findlater*, 7 C. D. 808; 47 L. J. Ch. 233; *Faulder & Co.* v. *Rushton & Co.*, (1903) 20 R. P. C. p. 489.

(*b*) See *Payton & Co.* v. *Snelling & Co.*, (1901) A. C. p. 310; 70 L. J. Ch. p. 645; *Bourne* v. *Swan and Edgar*, (1903) 1 Ch. p. 223; 72 L. J. Ch. p. 173; *Singer Manufacturing Co.* v. *British Empire Manufacturing Co.*, (1903) 20 R. P. C. pp. 318, 319; *Schweppes* v. *Gibbens*, (1905) 22 R. P. C. p. 607; *National Cash Register Co.* v. *Theeman*, (1907) 24 R. P. C. pp. 216, 217; *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, (1907) A. C. p. 438; 76 L. J. P. C. p. 104; *Aquascutum* v. *Cohen* (1909), 26 R. P. C. 653; *Claudius Ash & Co.* v. *Invicta Co.*, (1911) 28 R. P. C. p. 610; (1912) 29 R. P. C. 475.

(*c*) *Chappell* v. *Sheard*, 2 K. & J. 117; *Estcourt* v. *Estcourt Hop Essence Co.*, 10 Ch. p. 280; 44 L. J. Ch. 223; *Isaacson* v. *Thompson*, 41 L. J. Ch. 101; *National Starch Co.* v. *Munn's Co.*, (1894) A. C. 275; 63 L. J. P. C. 112; *Yost Typewriter Co.* v. *Typewriter Exchange Co.*, (1902) 19 R. P. C. 422; *Van Oppen & Co.* v. *Leonard Van Oppen*, (1903) 20 R. P. C. 617; *Royal Warrant Holders Association* v. *Slade & Co.*, (1908) 25 R. P. C. 245.

(*d*) *Fullwood* v. *Fullwood*, 9 C. D. p. 178; 47 L. J. Ch. 459. As to right to damages being lost by delay, see *Gledhill* v. *British Perforated Paper Co.*, (1911) 28 R. P. C. 451.

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no more a bar to a suit for an injunction in aid of the legal right than it is to an action of deceit (*e*).

Delay on motion for injunction.

But delay may cause the Court to refuse an interlocutory injunction, especially if the defendant has built up a trade in which he has notoriously used the mark (*f*).

May amount to abandonment.

Delay, moreover, may prevent conduct which would at first be an infringement from being calculated to deceive (*g*), and where the infringements are numerous and notorious, may amount to abandonment of the trade mark (*h*). But delay is not a bar where it can be explained away, where for instance it takes place in order that the plaintiff may obtain evidence necessary to establish his case (*i*).

Ex parte injunction.

In a plain and urgent case the motion for an injunction is often made *ex parte*. Where the defendant is committing a deliberate fraud it is important to obtain an *ex parte* order before giving the defendant a notice which may lead to the disposal of any spurious goods which he is about to put upon the market (*j*).

Injunction notwithstanding promise not to use the mark.

The owner of a trade mark, whose mark has been illegally taken by another, is not bound to rely upon his assurance or promise not to repeat the illegal appropriation of the mark, but is entitled to the protection of the Court by injunction (*k*). Nor is it necessary that any actual infringement should have occurred if it is proved that the defendant contemplates com-

(*e*) *Fullwood* v. *Fullwood*, *supra*; see *Three Towns Banking Co.* v. *Maddever*, 27 C. D. p. 532; 53 L. J. Ch. 998.

(*f*) *Yost Typewriter Co.* v. *Typewriter Exchange Co.*, (1902) 19 R. P. C. 422; *Royal Warrant Holders Association* v. *Slade*, (1908) 25 R. P. C. 245, 247.

(*g*) *Londonderry* v. *Russell*, 3 T. L. R. 360.

(*h*) *National Starch Co.* v. *Munn's Starch Co.*, (1894) A. C. 275; 63 L. J. P. C. 112.

(*i*) *Lee* v. *Haley*, 5 Ch. p. 160; 39 L. J. Ch. 285.

(*j*) See *Weingarten* v. *Bayer*, 22 R. P. C. p. 350; 92 L. T. p. 513 (H. L.).

(*k*) *Millington* v. *Fox*, 3 M. & C. 338; 45 R. R. 271; *Geary* v. *Norton*, 1 De G. & Sm. 9; 75 R. R. 1; *Welch* v. *Knott*, 4 K. & J. 747; 116 R. R. 529; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *American Tobacco Co.* v. *Guest*, (1892) 1 Ch. p. 632; 61 L. J. Ch. 242; *Slazenger* v. *Spalding*, (1910) 1 Ch. 261; 79 L. J. Ch. 122. Where infringement is accidental, the plaintiff may be required to accept the defendant's undertaking in lieu of an injunction: *Lever Bros.* v. *Maabro' Equitable Pioneer Society*, (1911) 105 L. T. p. 951, affirmed on appeal (1912), 106 L. T. 472.

mitting one, and it is sufficient evidence of this that he is in possession of a considerable quantity of spurious goods (*l*), even though they are only in his possession as a forwarding agent (*m*). "The life of a trade mark depends upon the promptitude with which it is vindicated," and therefore the plaintiff is not bound to give the defendant notice before issuing the writ and serving the defendant with notice of motion for an injunction to restrain him from parting with the goods (*n*).

Plaintiff need not give defendant notice before issue of writ.

The plaintiff is as a general rule entitled to an injunction although the defendant may have used the trade mark in ignorance of the right of the plaintiff (*o*).

Plaintiff as a rule entitled to injunction though infringement innocent, but not to an account or inquiry as to damages.

But where a defendant has infringed innocently, the Court will not order an account of profits or an inquiry as to damages unless the defendant continues to infringe after notice of the plaintiff's rights (*p*). The register of trade marks is not notice to the public of the existence of a registered trade mark (*q*).

Register not notice to public of registered marks.

A man, who has innocently advanced money upon dock warrants for goods to which a certain trade mark has been fraudulently affixed may, upon offering to remove the mark, have an injunction dissolved which was granted to restrain the wharfinger from parting with the goods (*r*).

Right of innocent mortgagee of goods fraudulently marked.

The precise terms of an injunction must depend upon the particular facts of the case (*s*). The order usually restrains

Form of injunction.

(*l*) *Upmann* v. *Forester*, 24 C. D. 231; 52 L. J. Ch. 946.

(*m*) *Upmann* v. *Elkan*, 12 Eq. 140; 40 L. J. Ch. 475; 7 Ch. 130; 41 L. J. Ch. 246.

(*n*) *Orr-Ewing* v. *Johnston & Co.*, 13 C. D. p. 464; 7 A. C. p. 229; *Upmann* v. *Forester*, 24 C. D. 231; 52 L. J. Ch. 946; *Upmann* v. *Elkan*, 7 Ch. p. 133; 41 L. J. Ch. 246; *Weingarten* v. *Bayer*, (1905) 92 L. T. p. 513; 22 R. P. C. p. 350. But see *Bass & Co.* v. *Laidlaw*, (1909) 26 R. P. C. 211.

(*o*) *Upmann* v. *Forester*, *supra*; *Singer Manufacturing Co.* v. *Wilson*, 3 A. C. 392; *Bow* v. *Hart*, (1905) 1 K. B. p. 600; 74 L. J. K. B. p. 344; *Slazenger* v. *Spalding*, (1910) 1 Ch. 257; 79 L. J. Ch. 922; *Catterson* v. *Anglo-Foreign Manufacturing Co.*, (1911) 28 R. P. C. 74; see *Yeatman* v. *Homberger & Co.* (1912), 56 S. J. 614, where defendant before action offered an undertaking but took no steps to repair injury to plaintiff.

(*p*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Slazenger* v. *Spalding*, (1910) 1 Ch. 257; 79 L. J. Ch. 122.

(*q*) *Slazenger* v. *Spalding*, *supra*.

(*r*) *Ponsardin* v. *Peto*, 33 Beav. 642; 33 L. J. Ch. 371.

(*s*) *Montgomery* v. *Thompson*, (1891) A. C. p. 221; 60 L. J. Ch. p. 759. For forms of injunction to restrain infringement of trade

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the use by the defendant, his servants and agents, of the plaintiff's trade marks or of marks only colourably differing from them in connection with goods of the kind for which they are registered by selling or otherwise disposing of the defendant's goods marked with such marks. The practice of the Court is to specify the particular user which the Court has found to be a violation of the plaintiff's right, and also to restrain violation generally (*t*).

The Court will not insert in the order any qualifying words which will leave it open to the defendant to say that the Court has in anticipation laid down a course which he may pursue (*u*).

Limited injunction.

The operation of an injunction may be limited to user by the defendant in a particular place (*x*).

Account. Inquiry as to damages. Delivery up.

A man whose trade mark has been infringed is as a general rule entitled not only to an injunction, but also to an account of profits "or" an inquiry as to damages in respect of the illegal user of the mark (*y*), and to have his mark erased from the articles upon which it has been wrongfully impressed and delivery up of the articles for such purpose (*z*). The account is limited to sales and profits acquired for six years

marks names, and passing off, see *Slazenger* v. *Feltham*, 6 R. P. C. 538; *Johnston* v. *Orr-Ewing*, 7 A. C. 219; 51 L. J. Ch. 797; *Montgomery* v. *Thompson*, (1891) A. C. p. 220; *Reddaway* v. *Banham*, (1896) A. C. pp. 221, 222; 65 L. J. Q. B. 381; *Pinet et Cie.* v. *Maison Louis Pinet*, (1898) 1 Ch. 179; 67 L. J. Ch. 41; *Cash* v. *Cash*, (1902) 86 L. T. 211; 19 R. P. C. 181; *Daimler Motor Co.* v. *London Daimler Co.* (1907), 24 R. P. C. 380; *Iron-Ox Remedy Co.* v. *Co-operative Wholesale Society*, (1907) 24 R. P. C. 434; *Iron-Ox Remedy Co.* v. *Leeds Industrial Society*, (1907) 24 R. P. C. 435; *Reg.* v. *Lecouturier*, (1908) 2 Ch. p. 733; 78 L. J. Ch. 181; *Kerfoot* v. *Cooper*, (1908) 25 R. P. C. 508; *Havana Cigar Co.* v. *Tiffin*, (1909) 26 R. P. C. p. 480; 27 R. P. C. 602; *Muralo* v. *Taylor*, (1910) 27 R. P. C. 261; *Lloyds* v. *Lloyds Southampton, Ld.*, (1912) 29 R. P. C. 439.

(*t*) See cases cited note (*s*) *supra*, and *Royal Warrant Holders Association* v. *Deane and Beale*, (1912) 1 Ch. p. 22; 81 L. J. Ch. p. 73.

(*u*) *Kerfoot* v. *Cooper*, (1908) 25 R. P. C. 508.

(*x*) See *Lee* v. *Haley*, 5 Ch. 155; 39 L. J. Ch. 284; *Orr-Ewing* v. *Johnston*, 13 C. D. p. 464; 7 A. C. p. 227; *Barber* v. *Monico*, 10 R. P. C. 93; *Re La Société Anonyme de Verreries de l'Étoile*, (1894) 1 Ch. 61; 63 L. J. Ch. 56; (1894) 2 Ch. 26; 63 L. J. Ch. 381.

(*y*) *Carlisle* v. *Carlisle*, 31 Beav. 292; *Edelsten* v. *Edelsten*, 1 De G. J. & S. p. 199; *Weingarten* v. *Bayer*, (1905) 92 L. T. p. 513; 22 R. P. C. p. 351.

(*z*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Dent* v. *Turpin*, 2

before the commencement of the action (*a*). But where a mark is innocently infringed, no account of profits or inquiry as to damages will be ordered unless the defendant continues to infringe after notice of the plaintiff's rights (*b*).

In taking the account, a man will not have to account for every species of profit made during the previous six years, but only for so much as is properly attributable to the user of the mark (*c*), nor will he be charged with bad debts as profits; but on the other hand, he cannot charge the plaintiff with the cost of manufacturing the goods in respect of which the bad debts have been incurred (*d*).

Where there is no trade mark, but the defendant has sold goods in packets so resembling those in which the plaintiff wraps his goods as to be calculated to deceive, the account will be of all profits made in selling the goods in the form in which defendant was not entitled to sell them. Although retail dealers who may have bought the goods from the defendant may not have been deceived, the account will not be limited by excluding from it goods which the retail dealers may have sold to persons who bought them as goods of the defendant (*e*).

No account where injury trifling,

Neither an account nor an inquiry as to damages will be granted if the evidence of sales under the objectionable mark is not sufficient to make it worth while (*f*).

or when plaintiff guilty of laches.

The owner of a trade mark though entitled to an injunction may by his conduct deprive himself of the right to an account of profits for six years previously to bringing the action (*g*).

J. & H. 139; 30 L. J. Ch. 495; *Ipmann* v. *Elkan*, 12 Eq. 140; 40 L. J. Ch. 475.

(*a*) *Nord* v. *Foster*, 7 Ch. p. 633; 41 L. J. Ch. p. 692.

(*b*) *Moet* v. *Couston*, 33 Beav. 578; 10 L. T. 395; *Slazenger* v. *Spalding*, (1910) 1 Ch. 261; 79 L. J. Ch. 122.

(*c*) *Cartier* v. *Carlisle*, 31 Beav. p. 298.

(*d*) *Edelsten* v. *Edelsten*, 10 L. T. 780.

(*e*) *Lever* v. *Goodwin*, 36 C. D. 1; 36 W. R. 177; *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893; 66 L. J. Ch. 533.

(*f*) *Boord* v. *Huddart*, (1904) 89 L. T. 718; 20 T. L. R. 144; *Joseph Crosfield & Sons* v. *Caton*, (1912) 29 R. P. C. 47.

(*g*) *Harrison* v. *Taylor*, 12 L. T. 339; 11 Jur. N. S. 408; *Beard* v. *Turner*, 13 L. T. 746 (laches); *Ford*

Inquiry as to damages.

The plaintiff must elect between the account and an inquiry as to damages; he cannot have both (*h*). On an inquiry as to what damage has accrued to a man from the unlawful use by another of his trade mark, the onus lies on him to prove special damage by loss of custom or otherwise, and it will not be assumed in the absence of evidence that the amount of goods sold by the defendant under the fraudulent trade mark would have been sold by the plaintiff but for the defendant's unlawful user of the mark (*i*).

Interrogatories for purposes of account and inquiry as to damages.

The defendant must, if required to do so for the purposes of the account or the inquiry as to damages, disclose the names of all persons to whom he has sold any goods with the mark imposed on them. If he be unable to do so, he may then be required to disclose the names of all persons to whom he has sold any goods which he will not swear positively were not stamped with the mark (*k*).

Costs.

Subject to sect. 46 of the Trade Marks Act, 1905 (which provides that the owner of a registered trade mark certified to be valid, shall have his full costs, charges and expenses as between solicitor and client in any subsequent legal proceeding in which the validity of the trade mark comes in question, unless the Court in such subsequent proceeding certifies that he ought not to have the same), the costs of an action for infringement follow the event (*l*), subject however to the discretion of the Court, as in any other action.

A man whose trade mark or trade name has been taken by another is as a general rule entitled to the costs of obtaining

v. *Foster*, 7 Ch. p. 633; 41 L. J. Ch. 682 (laches and misrepresentation).

(*h*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Neilson* v. *Betts*, L. R. 5 H. L. 22; 40 L. J. Ch. 317; *De Vitre* v. *Betts*, L. R. 6 H. L. 321; 42 L. J. Ch. 841; *Weingarten* v. *Bayer*, (1905) 92 L. T. p. 513; 22 R. P. C. p. 351; *Slazenger* v. *Spalding*, (1910) 1 Ch. p. 261; 79 L. J. Ch. 122.

(*i*) *Leather Cloth Co.* v. *Hirschfield*, 1 Eq. 299; *Magnolia Co.* v. *Atlas Co.*, 14 R. P. C. 398, 403; *Kinnell* v. *Ballentine & Sons*, (1910) 27 R. P. C. p. 191.

(*k*) *Leather Cloth Co.* v. *Hirschfield*, 1 H. & M. 295; 11 W. R. 933; *Powell* v. *Birmingham Vinegar Brewery Co.*, 14 R. P. C. 1; *Saccharin Corporation* v. *Chemicals Co.*, (1900) 2 Ch. 556; 69 L. J. Ch. 820.

(*l*) *Millington* v. *Fox*, 3 M. & C. 338; 45 R. R. 271; *Burgess* v. *Hills*, 26 Beav. 244; 28 L. J. Ch. 356; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185, 204; *Pierce* v. *Franks*, 15 L. J. Ch. 122; *McAndrew* v. *Bassett*, 4 De G. J. & S. 380, 387; 10 L. T. 65.

an injunction to restrain a repetition of the wrongful act (*m*). If the defendant on being served with the writ, does not contest the plaintiff's claim, but offers him the relief to which he is entitled, the plaintiff should not bring the cause to a hearing. If he proceeds with his action and fails to obtain more than he was offered, he will lose his right to the costs incurred after the defendant's offer (*n*), and may be ordered to pay the defendant's costs (*o*). But if the defendant upon notice of the plaintiff's right and the fact of its violation, instead of submitting to the injunction with costs, contests the plaintiff's right or refuses any of the terms to which the plaintiff is entitled (*p*), or insists on conditions to which he is not entitled, *e.g.*, that the order be not advertised (*q*), the cause may be brought to a hearing and the plaintiff will have the cost of the suit. A person having in his hands or under his control goods bearing a forged trade mark is bound upon the fact being brought to his knowledge at once to submit to do whatever he may be compelled to do on an action being brought against him; otherwise, however innocently the goods may have come to him he will be liable for the costs of an action brought by the person whose right is infringed for the purpose of obtaining relief (*r*). Where a defendant consents to the

(*m*) *Guardian Fire and Life Insurance Co.* v. *Guardian and General Insurance Co.*, 50 L. J. Ch. 256; *Upmann* v. *Forester*, 24 C. D. 231; 52 L. J. Ch. 946. See *Burgoyne & Co.* v. *Burgoyne, Godfrey & Co.*, (1905) 22 R. P. C. p. 171; *Hanfstaengl* v. *Smith*, (1905) 1 Ch. p. 528; 74 L. J. Ch. 304 (copyright).

(*n*) *Millington* v. *Fox*, 3 M. & C. 338; 45 R. R. 271; *McAndrew* v. *Bassett*, 4 De G. J. & S. 387; 10 L. T. 65; *Moet* v. *Couston*, 33 Beav. p. 581; 10 L. T. 395; *Nunn* v. *D'Albuquerque*, 34 Beav. 595; *Hudson* v. *Bennett*, 14 L. T. 698; 14 W. R. 911; *Fettes* v. *Williams*, (1908) 25 R. P. C. 511 (costs of further consideration); *Lever Bros.* v. *Masbro' Equitable Pioneers Society*, (1912) 106 L. T. 472; 28 T. L. R. 294.

(*o*) *Base* v. *Dawber*, 19 L. T. p. 628; *Jan* v. *Grossman*, 12 R. P. C. 537 (design); *Vernon* v. *Buchanan Flour Co.*, (1906) 23 R. P. C. 17; *Slazenger* v. *Spalding*, (1910) 1 Ch. 261; 79 L. J. Ch. 122. See *Lever Bros.* v. *Masbro' Equitable Pioneers Society*, (1912) 106 L. T. p. 474; 28 T. L. R. 294.

(*p*) *Geary* v. *Norton*, 1 De G. & Sm. 9; 75 R. R. 1; *Burgess* v. *Hatley*, 26 Beav. 249; *Hipkins* v. *Plant*, 15 R. P. C. 294; *Hat Manufacturers Supply Co.* v. *Tomlin*, (1906) 23 R. P. C. 413.

(*q*) *Henry Clay & Co.* v. *Phillips*, (1910) 27 R. P. C. 508.

(*r*) *Upmann* v. *Elkan*, 12 Eq. 140; 40 L. J. Ch. 475; 7 Ch. 132; 41

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plaintiff obtaining an order in chambers for the relief claimed, the plaintiff will not necessarily be allowed the extra cost of bringing the matter on in Court (*s*). Where the Court was of opinion that both plaintiff and defendant were deceiving the public, no costs were given (*t*).

Though the case for an injunction may fail, the dismissal of the action may be without costs, if the defendant has been guilty of improper conduct (*u*). But in order to be deprived of his costs the defendant's improper conduct must have been in connection with the subject matter of the action (*x*). If a trader imitates another's label or trade mark, even though the case may be one where the Court may refuse an injunction, it will not willingly give the defendant his costs (*y*). Infancy will not protect a person from being ordered to pay the costs of the action (*z*).

Lien of wharfingers for costs.

In a case where wharfingers were in possession of goods bearing a brand in spurious imitation of the brand of the plaintiff, it was held that the plaintiff was entitled to have the brand removed, but that his lien on the goods for his costs, if it did exist, must be postponed to the wharfinger's costs (*a*).

County court.

A county Court has no jurisdiction to entertain an action for infringement of a registered trade mark (*b*).

L. J. Ch. 130; *Moet* v. *Pickering*, 8 C. D. 372; 47 L. J. Ch. 527.

(*s*) *Slazenger* v. *Pigott*, 12 R. P. C. 439 (extra costs disallowed); *Gandy Bell Manufacturing Co.* v. *Fleming*, 18 R. P. C. 276; *Royal Warrant Holders Association* v. *Kitson*, (1909) 26 R. P. C. 157 (extra costs allowed).

(*t*) *Estcourt* v. *Estcourt Hop Essence Co.*, 10 Ch. 280; 44 L. J. Ch. 223; *Thorneloe* v. *Hill*, 11 R. P. C. 61.

(*u*) *Rodgers* v. *Rodgers*, 22 W. R. 888; 31 L. T. 285; *Borthwick* v. *The Evening Post*, 37 C. D. p. 465; 57 L. J. Ch. 406; *Thorneloe* v. *Hill*, (1894) 1 Ch. p. 578; 63 L. J. Ch. 331; *Warsop & Sons* v. *Warsop*, (1904) 21 R. P. C. 481 (wrongful use of word "registered"); *King* v. *Gillard*, (1905) 2 Ch. 7; 74 L. J. Ch. 421; *Claudius Ash* v. *Invicta Co.*, (1911) 28 R. P. C. 597.

(*x*) *King* v. *Gillard*, (1905) 2 Ch. 7; 74 L. J. Ch. 421.

(*y*) *Bass* v. *Dawber*, 19 L. T. 627.

(*z*) *Chubb* v. *Griffiths*, 35 Beav. 127; *Woolf* v. *Woolf*, (1899) 1 Ch. 343; 68 L. J. Ch. 82.

(*a*) *Upmann* v. *Elkan*, 12 Eq. 140; 40 L. J. Ch. 475; 7 Ch. 132; 41 L. J. Ch. 246; *Moet* v. *Pickering*, 8 C. D. 372; 47 L. J. Ch. 527.

(*b*) *Bow* v. *Hart*, (1905) 1 K. B. 592; 74 L. J. K. B. 341.

CHAPTER IX.

INJUNCTIONS TO RESTRAIN THE INFRINGEMENT OF COPYRIGHT.

SECTION 1.—COPYRIGHT.

By the Copyright Act, 1911 (*a*), the law of copyright is amended and consolidated, the former enactments relating to copyright being, with a few exceptions (*b*), repealed (*c*).

Copyright depends on statute.

Copyright in all works, whether published or unpublished, now exists only by statute, sect. 31 of the Act providing that no person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of the Act, or of any other statutory enactment for the time being in force, but that nothing in the section is to be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence (*d*).

Copyright.

By sect. 1 (1) of the Act, copyright subsists throughout the parts of the King's dominions to which the Act extends (*e*), for the term mentioned (*f*) in the Act, in every original (*g*)

(*a*) 1 & 2 Geo. 5, c. 46.

(*b*) 25 & 26 Vict. c. 68, ss. 7, 8, the Fine Arts Copyright Act (penalties for fraudulent exhibitions and sales); 2 Geo. 5, c. 46, & 6 Edw. 7, c. 36, Musical Copyright Acts, 1902, 1906 (except provision in latter Act as to registration, which is abolished). As to registration, see *Evans* v. *Morris*, (1913) W. N. 58.

(*c*) Copyright Act, 1911, s. 31 and sched. 11.

(*d*) See *Merryweather* v. *Moore*, (1892) 2 Ch. 518; 61 L. J. Ch. 505; *Lamb* v. *Evans*, (1893) 1 Ch. 218; 62 L. J. Ch. 404; *Robb* v. *Green*, (1895) 2 Q. B. 315; 64 L. J. Q. B. 593; *Louis* v. *Smellie*, 73 L. T. 226; *Exchange Telegraph Co.* v. *Gregory*, (1896) 1 Q. B. 147; 65 L. J. Q. B. 262; *Exchange Telegraph Co.* v. *Central News Co.*, (1897) 2 Ch. 48; 66 L. J. Ch. 672; *Measures Brothers* v. *Measures*, (1910) 1 Ch. p. 343; 79 L. J. Ch. p. 710; *Litholite Co.* v. *Tracts and Insulators Co.*, (1913) 30 R. P. C. 266.

(*e*) *I.e.*, throughout the British dominions except as to the summary remedies under sects. 11—13, which are restricted to the United Kingdom: Copyright Act, 1911, s. 25 (1). As to self-governing dominions, see sects. 25, 26.

(*f*) Sect. 3, term in general; see sect. 16, joint authors; sect. 17, posthumous works; sect. 18, Government publications; sect. 19, mechanical instruments; sect. 21, photographs; sect. 29 (1), (ii.), international copyright, *infra*.

(*g*) See *infra*, p. 391.

literary (*h*), dramatic (*i*), musical (*k*), and artistic work (*l*); if—

In the case of a published (*m*) work, the work was first published within such part of the King's dominions, and—

In the case of an unpublished (*n*) work, the author was at the date of the making of the work a British subject or resident (*o*) within such parts of the King's dominions, but in no other works except so far as the protection conferred by the Act is extended by Orders in Council thereunder relating to self-governing dominions (*p*) to which the Act does not extend (*q*) and to foreign countries (*r*).

Meaning of copyright.

For the purposes of the Act, copyright is defined (*s*) as the sole right to produce or reproduce (*t*) a work or any substantial part thereof in any material form whatsoever, to perform (*u*), or in the case of a lecture (*x*), to deliver (*y*) the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and also includes the sole right—

(1) to produce, reproduce (*z*), perform, or publish any translation of the work;

(*h*) See *infra*, p. 402. "Literary work" is not defined by the Act, but includes maps, charts, plans, tables, and compilations: sect. 35, sub-s. 1. See *Libraco* v. *Shaw Walker*, (1913) 30 T. L. R. 22.

(*i*) See *infra*, p. 406; as to what "dramatic work" includes, sect. 35, sub-s. 1.

(*k*) See *infra*, p. 406. The term "musical work" is not defined by the Act, but is defined by 2 Edw. 7, c. 15, s. 3, as "any combination of melody and harmony or either of them printed, reduced to writing, or otherwise graphically produced or reproduced."

(*l*) "Artistic work" includes (*inter alia*) works of painting, drawing, sculpture, and architectural works of art, engravings, and photographs Copyright Act, 1911, s. 35 (1).

(*m*) As to meaning of "publication," see sects. 1 (3), 35 (3), *infra*, p. 391.

(*n*) See sect. 35, sub-s. 4.

(*o*) See sect. 35, sub-s. 5.

(*p*) See sect. 35, sub-s. 1.

(*q*) See sects. 25, 26.

(*r*) See sect. 29.

(*s*) Sect. 1 (2).

(*t*) See *Millar* v. *Lang & Polak*, (1908) 1 Ch. 433; 77 L. J. Ch. 241; *Whitehead* v. *Wellington*, (1911) 55 S. J. 272.

(*u*) As to performance, see sect. 35, sub-s. 1.

(*x*) Lecture includes address, speech, and sermon: sect. 35, sub-s. 1.

(*y*) Delivery in relation to lecture includes delivery by means of any mechanical instrument, ib.

(*z*) See *Frost* v. *Olive Series Publishing Co.*, (1908) 24 T. L. R.

(2) in the case of a dramatic work, to convert it into a novel or other non-dramatic work;

(3) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;

(4) in the case of a literary, dramatic, or musical work, to make any record (*a*), perforated roll, cinematograph film (*b*), or other contrivance by means of which the work may be mechanically performed or delivered;

and to authorise any such acts.

Publication.

For the purposes of the Act, publication, in relation to any work, means "the issue of copies to the public," and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but, for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art is not to be deemed to be publication of such works (*c*).

Originality.

To be entitled to copyright a work need not consist of new matter, a mere compilation (*d*) of old materials, or of materials which are common to all men, and merely the result of inquiry and industry, such as calendars (*e*), catalogues (*f*), directories (*g*), encyclopedias (*h*), gazetteers (*i*), law re-

648; *Whitehead* v. *Wellington*, (1911) 55 S. J. 272.

(*a*) As to the law before the Act, see *Monckton* v. *Gramophone Co.*, (1912) 106 L. T. 84; W. N. 32.

(*b*) See as to the former law, *Karno* v. *Pathé Frères*, (1909) 100 L. T. 260; *Glenville* v. *Selig Polyscope Co.*, (1911) 27 T. L. R. 554.

(*c*) Sect. 1, sub-s. 3.

(*d*) Compilations are now included in literary works, sect. 35, sub-s. 1; see *Nisbet* v. *Golf Agency*, (1907) 23 T. L. R. 370 (biographical notes of golfers).

(*e*) *Longman* v. *Winchester*, 16 Ves. 269.

(*f*) *Hotten* v. *Arthur*, 1 H. & M. 603; 32 L. J. Ch. 771; *Grace* v. *Newman*, 19 Eq. 623; 44 L. J. Ch. 298; *Maple* v. *Junior Army and Navy Stores*, 21 C. D. 369; 52 L. J. Ch. 67; *Collis* v. *Cator*, 78 L. T. 613; *Cable* v. *Marks*, 58 L. J. Ch. 107; *Cooper* v. *Stevens*, (1895) 1 Ch. 567; *Marshall* v. *Bull*, 85 L. T. 77; *Litholite Co.* v. *Travis and Insulators Co.*, (1913) 30 R. P. C. 266.

(*g*) *Kelly* v. *Morris*, 1 Eq. 697; 35 L. J. Ch. 423; *Lamb* v. *Evans*, (1893) 1 Ch. 218; 62 L. J. Ch. 404.

(*h*) *Mawman* v. *Legge*, 2 Russ. 385; 26 R. R. 112.

(*i*) *Lewis* v. *Fullarton*, 2 Beav. 6; 8 L. J. (N. S.) Ch. 291; 50 R. R. 84.

ports (*k*), lists of brood mares (*l*), price sheets (*m*), telegraph codes (*n*), time tables (*o*), may be the subject of copyright if independent work gives an original result (*p*). But a work must be the composition of the person claiming copyright therein, and it must contain an element of literary value (*q*). Accordingly, a mere list of names conveying no useful information (*r*), a cardboard pattern sleeve containing directions for measuring and cutting out ladies' sleeves (*s*), and a list of horses selected as probable winners (*t*), a common phrase for the title of a book or play (*u*), have been held not to be the subject of copyright.

Duration of copyright.

The term for which copyright subsists is, except as otherwise expressly provided by the Act (*x*), the life of the author and a period of fifty years after his death; but any time after the expiration of twenty-five years, or in the case of a work in which copyright was subsisting at the passing of the Act, thirty years from the death of the author of a published work, copyright in the work is not infringed by the reproduction of the work for sale, if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the

(*k*) *Sweet* v. *Maugham*, 11 Sim. 51; 9 L. J. Ch. 323; *Stevens* v. *Wildy*, 19 L. J. Ch. 190; *Saunders* v. *Smith*, 3 M. & C. 711; 7 L. J. Ch. 207 (marginal notes); *Incorporated Society of Law Reporting* v. *Green*, (1912) W. N. 243.

(*l*) *Weatherby* v. *International Horse Agency and Exchange Co.*, (1910) 2 Ch. 297; 79 L. J. Ch. 609.

(*m*) *Davis* v. *Benjamin*, (1906) 2 Ch. 491; 75 L. J. Ch. 800.

(*n*) *Ayar* v. *P. and O. Steamship Co.*, 26 C. D. 637.

(*o*) *Leslie* v. *Young*, (1894) A.C. 335.

(*p*) Copyright Act, 1911, s. 1, sub-s. 1; and see *Dicks* v. *Yates*, 18 C. D. pp. 89, 92; 50 L. J. Ch. 809.

(*q*) *Weatherby* v. *International Horse Agency and Exchange Co.*, (1910) 2 Ch. p. 304; 79 L. J. Ch. 609; *Libraco* v. *Shaw, Walker & Co.*, (1913) 30 T. L. R. 22; *Brumel* v. *Meyer*, (1913) 29 T. L. R. 148.

(*r*) *Weatherby* v. *International Horse Agency*, *supra*.

(*s*) *Hollinrake* v. *Truswell*, (1894) 3 Ch. 420; 63 L. J. Ch. 919; see *Libraco* v. *Shaw, Walker & Co.*, *supra* (card-index system).

(*t*) *Chilton* v. *Progress Printing Co.*, (1895) 2 Ch. 29, 43; 43 W. R. 136.

(*u*) *Dick* v. *Yates*, 18 C. D. 76; 50 L. J. Ch. 809; *Crotch* v. *Arnold*, (1910) 54 S. J. 49 (book); *Brumel* v. *Meyer*, (1913) 29 T. L. R. 148 (play).

(*x*) *I.e.*, in the case of joint authors, sect. 16, sub-s. 1; posthumous works, sect. 17, sub-s. 1; Government publications, sect. 18; mechanical instruments, sect. 19, sub-s. 1; photographs, sect. 21.

work, and that he has paid the prescribed royalties in respect of all copies of the work sold by him (*y*).

Duration of copyright in works of joint authors.

In the case of a work of joint authorship, which is defined by the Act (*z*) as a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors, copyright subsists during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer (*a*).

Duration of copyright in posthumous works.

In the case of a literary, dramatic, or musical work, or an engraving in which copyright subsists at the date of the death of the author or, in the case of a work of joint authorship, at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed (*b*) in public, nor, in the case of a lecture, been delivered in public, before that date, copyright subsists till publication, or performance or delivery in public, whichever first happens, and for a term of fifty years thereafter (*c*).

Duration of copyright in Government publications.

Where any work has, whether before or after the commencement of the Act (*d*), been prepared or published by or under the direction or control of the Crown or any Government department, the copyright in the work, subject to any agreement with the author, belongs to the Crown, and continues for a period of fifty years from the date of the first publication of the work (*e*).

Duration of copyright in mechanical instruments.

In the case of records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced copyright subsists as if such contrivances were musical works, the term of copyright being fifty years

(*y*) Sect. 3. As to notices and royalties, see the Copyright Royalty System Regulations, 1912, St. R. & O. No. 532; and as to the grant of compulsory licences to reproduce the work, see sect. 4.

(*z*) Sect. 16, sub-s. 3.

(*a*) Sect. 16, sub-s. 1.

(*b*) Sect. 35, sub-s. 1.

(*c*) Sect. 17, sub-s. 1.

(*d*) In the United Kingdom July 1st, 1912: sect. 37, sub-s. 2 (a).

(*e*) Sect. 18. The provisions of this section are without prejudice to any rights or privileges of the Crown (ib.).

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from the making of the original plate (*f*) from which the contrivance was derived (*g*).

Where the record, perforated roll, or other mechanical contrivance was made before the commencement of the Act, copyright subsists therein as from the commencement of the Act for the like term as if the Act had been in force at the date of the making of the original plate from which the contrivance was derived (*h*). But copyright is not conferred by this provision of the Act in any such contrivance if the making thereof would have infringed copyright in some other such contrivance if this provision of the Act had been in force at the time of the making of the first-mentioned contrivance (*i*).

Duration of copyright in photographs.

The term for which copyright subsists in photographs (*k*) is fifty years from the making of the original negative from which the photograph was derived (*l*).

Ownership of copyright.

Subject to the provisions of the Act, the author of a work is the first owner of the copyright therein (*m*).

Photographs.

In the case of photographs (*n*), the owner of the negative at the time when the negative was made, is deemed to be the author of the work (*o*).

Mechanical instruments.

In the case of records, perforated rolls, and mechanical contrivances, by means of which sounds are mechanically reproduced, the owner of the original plate (*p*), from which the contrivance was derived at the time when such plate was made is deemed to be the author of the work (*q*). Where such record, perforated roll, or other mechanical contrivance was made before the commencement of the Act, the person who at the commencement of the Act was the owner of such original plate, is the first owner of the copyright (*r*).

Engravings and photographs made to order;

Where in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other

(*f*) See sect. 35, sub-s. 1, as to what is included in "plate."
(*g*) Sect. 19, sub-s. 1.
(*h*) Sect. 19, sub-s. 8.
(*i*) Sect. 19, sub-s. 8 (ii.).
(*k*) See sect. 35, sub-s. 1, as to what "photograph" includes.
(*l*) Sect. 21.
(*m*) Sect. 5, sub-s. 1.
(*n*) See sect. 35, sub-s. 1.
(*o*) Sect. 21.
(*p*) See sect. 35, sub-s. 1.
(*q*) Sect. 19, sub-s. 1.
(*r*) Sect. 19, sub-s. 8 (1).

person and was made for valuable consideration (*s*) in pursuance of the order, the person by whom such plate or other original was ordered is the first owner of the copyright, in the absence of an agreement to the contrary (*t*).

or made by another in course of employment.

Where the author was in the employment of some other person under a contract of service or apprenticeship, and the work was made in the course of his employment by that person, the employer is, in the absence of any agreement to the contrary, the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there is in the absence of any agreement to the contrary, deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical (*u*).

Posthumous works.

The ownership of an author's manuscript (*x*) after his death, where such ownership is acquired under the author's testamentary disposition, and the manuscript is of a work which has not been published, nor performed, nor delivered in public, is *primâ facie* proof of the copyright being with the owner of the manuscript (*y*).

Government publications.

The copyright in any work prepared or published by or under the direction or control of the Crown or any Government department belongs to the Crown subject to any agreement with the author (*z*).

Rights substituted by Copyright Act, 1911, for rights existing at commencement of Act.

Persons who were immediately before the commencement of the Act (*a*) entitled to rights or interests in any literary, dramatic, musical, or artistic work, are entitled to rights and interests under the Act in substitution for their former rights. Thus, a person who was entitled to copyright (*b*) in any

(*s*) See *Boucas* v. *Cooke*, (1903) 2 K. B. 227; 72 L. J. K. B. 741; *Stackemann* v. *Paton*, (1906) 1 Ch. 774; 75 L. J. Ch. 590.

(*t*) Sect. 5, sub-s. 1 (a). See *Boucas* v. *Cooke*, *supra*.

(*u*) Sect. 5, sub-s. 1 (b). See *Chantrey* v. *Dey*, (1912) 28 T. L. R. 499 (auditor's report).

(*x*) See *Macmillan* v. *Dent*, (1907) 1 Ch. pp. 107, 110; 76 L. J. Ch. 133.

(*y*) Sect. 17, sub-s. 2.

(*z*) Sect. 18.

(*a*) July 1st, 1912, in the United Kingdom: sect. 37, sub-s. 2 (a).

(*b*) Including the right at common law (if any) to restrain the publication or other dealing with the

work other than a dramatic or musical work, is now entitled to copyright in the work under the Act (*c*).

A person who was entitled to both copyright and performing right (*d*) in any musical or dramatic work, is now entitled to copyright in the work under the Act (*c*).

A person who was entitled to copyright, but not to performing right, in any musical or dramatic work, is now entitled to copyright in the work under the Act, except the sole right to perform the work or any substantial part thereof in public (*e*).

A person who was entitled to performing right, but not to copyright in a musical or dramatic work is now entitled under the Act to the sole right to perform the work in public, but to none of the other rights comprised in copyright under the Act (*f*).

Term of substituted right.

The substituted right subsists for the term for which it would have subsisted if the Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder (*g*).

Assignment of former rights.

If the author (*h*) of a work in which any of the above mentioned former rights subsisted at the commencement of the Act, before that date, has assigned any such right or granted any interest therein for the whole term of such right, then at the date when, but for the passing of the Act, such right would have expired, the substituted right conferred by the Act, in the absence of express agreement, will pass to the

work: sect. 24, sub-s. 1, and Sch. I.

(*c*) Sect. 24, sub-s. 1, and Sch. I. In the case of an essay, article, or portion forming part of, and first published in a review, magazine, or other periodical, or work of a like nature, the right is subject to any right of publishing the essay, article, or portion in a separate form to which the author was entitled at the commencement of the Act, or would if the Act had not been passed, have become entitled under sect. 18 of the Copyright Act, 1842.

(*d*) Including the right at common law (if any) to restrain the performance thereof in public: sect. 24, sub-s. 1, Sch. I.

(*e*) Sect. 24, sub-s. 1, and Sch. I.

(*f*) Sect. 24, sub-s. 1, and Sch. I.

(*g*) Sect. 24, sub-s. 1.

(*h*) Including the legal personal representatives of a deceased author: sect. 24, sub-s 2.

author of the work, and any interest therein created before the commencement of the Act and then subsisting will determine; but the person who immediately before the date at which the right would so have expired, was the owner of the right or interest will be entitled at his option either (1) in giving the prescribed notice, to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right on payment of such consideration as may be agreed, or determined by arbitration (*i*); or, (2) without any such assignment or grant, to continue to reproduce or perform the work subject to payment if duly demanded by the author of such royalties as may be agreed, or determined by arbitration, or where the work is incorporated in a collective work (*k*) and the owner of the right or interest is the proprietor of such collective work, without any such payment (*l*).

Assignment of copyright.

The owner of copyright in any work may assign the right wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion or other part of the King's dominions to which the Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent (*m*).

Partial assignment.

Where there has been a partial assignment of copyright, the assignee, as respects the right so assigned, and the assignor as respects the rights not assigned, are for the purposes of the Act the owner of the copyright (*n*).

Restrictions on right of assignment.

Where the author of a work is the first owner of the copyright therein, no assignment of the copyright and no grant of any interest therein made by him (otherwise than by will) after the passing of the Act (*o*), is operative to vest in the assignee or grantee any rights with respect to the copyright

(*i*) Sect. 24, sub-s. 1 (a) (i.).

(*k*) For meaning of "collective work," see sect. 35, sub-s. 1.

(*l*) Sect. 24, sub-s. 1 (a) (ii.).

(*m*) Sect. 5, sub-s. 2.

(*n*) Sect. 5, sub-s. 3.

(*o*) December 16th, 1911.

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in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period on the death of the author devolves on his legal personal representatives notwithstanding any agreement to the contrary, and any agreement entered into by him as to the disposition of such reversionary interest is null and void; but this provision of the Act does not apply to the assignment of the copyright in a collective work or a licence to publish a work or part of a work as part of a collective work (*p*).

Assignment of musical works before December 16th, 1911, and rights in mechanical instruments.

Notwithstanding any assignment before the passing of the Act of the copyright in a musical work, the rights conferred by the Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed, belong to the author or his legal personal representatives and not to the assignee, and the royalties (*q*) are payable to the author of the work or his legal personal representatives (*r*).

Agreement to assign copyright.

An agreement to assign the copyright in a work operates as an equitable assignment (*s*).

Agreement to publish not an assignment.

An agreement between publishers and an author to print and publish a work at their own risk, on the terms of dividing equally with him the profits, and stipulating that if another edition should be required the author should make all necessary additions and alterations, is not an assignment of the copyright, but is an agreement of a personal nature or joint adventure between the parties (*t*), which either is at liberty to terminate upon notice after the publication of a given edition, if at the date of such notice no fresh expense

(*p*) Sect. 5, sub-s. 2, proviso. As to meaning of "collective work," see sect. 35, sub-s. 1.

(*q*) As to payment of royalties, see sect. 19, sub-ss. 3, 6, 7 (b), and the Copyright Royalty System (Mechanical Musical Instruments) Regulations, 1912, St. R. & O. No. 533; *Rubens* v. *Pathé Frères Pathephone Co.*, (1913) 29 T. L. R. 174.

(*r*) Sect. 19, sub-s. 7 (c).

(*s*) *Ward, Lock & Co.* v. *Long*, (1906) 2 Ch. 550; 75 L. J. Ch. 732.

(*t*) *Stevens* v. *Benning*, 6 De G. M. & G. 223; 24 L. J. Ch. 153; *Reade* v. *Bentley*, 3 K. & J. 271; 27 L. J. Ch. 254; 4 K. & J. 656; and see *Hole* v. *Bradbury*, 12 C. D. 886; 48 L. J. Ch. 673; *Lucas* v. *Moncrieff*, (1905) 21 T. L. R. 683; *Re Jude's Musical Compositions*, (1907) 1 Ch. 651; 76 L. J. Ch. 542.

has been incurred by the party to whom such notice has been given (*u*). The publisher is not entitled after the termination of the agreement by the author to restrain the publication by another publisher of a new edition before all the copies of the former edition published by himself have been sold (*x*).

The benefit of such a publishing agreement is not assignable by the publisher without the consent of the author (*y*). But where a licence in general terms was granted to a person "to print, publish, and sell" a musical composition, it was held that the licensee was not bound under the licence to print and publish the work in his own name (*z*).

Rights of assignor after assignment to sell copies.

In the absence of special agreement to the contrary, the assignor of a copyright is entitled, after the assignment, to continue selling copies of the work printed by him before the assignment and remaining in his possession (*a*).

Rights of publisher after expiration of licence to sell copies.

So also where an author sells the copyright in a book to a publisher for a certain specified time, the publisher has the right after the expiration of that period of selling copies of the work he has printed before the expiration of the time limited (*b*).

SECTION 2.—THE INFRINGEMENT OF COPYRIGHT.

Infringements of copyright.

Copyright in a work is infringed by any person who, without the consent of the owner (*c*) of the copyright, does anything the sole right to do which is by the Copyright Act, 1911, conferred on the owner of the copyright (*d*), or who

sells, or lets for hire, or by way of trade exposes or offers for sale (*e*), or hire; or

(*u*) *Stevens* v. *Benning*; *Reade* v. *Bentley*, *supra*.

(*x*) *Warne* v. *Routledge*, 18 Eq. 497; 43 L. J. Ch. 604.

(*y*) *Griffith* v. *Tower Publishing Co.*, (1897) 1 Ch. 21; 66 L. J. Ch. 12; *Lucas* v. *Moncrieff*, (1905) 21 T. L. R. 683 (trustee in bankruptcy of publisher).

(*z*) *Booth* v. *Lloyd*, (1910) 26 T. L. R. 549.

(*a*) *Taylor* v. *Pillow*, 7 Eq. 418.

(*b*) *Howitt* v. *Hall*, 10 W. R. 381; 6 L. T. 348.

(*c*) Copyright Act, 1911, ss. 5, sub-ss. 1 and 3; 16, sub-s. 2; 18, 19, sub-s. 1; 21, *ante*, pp. 394, 395.

(*d*) Sect. 1, sub-s. 2, *ante*, p. 390.

(*e*) See *Britain* v. *Kennedy*, (1902) 19 T. L. R. 122.

distributes either for the purpose of trade, or to such an extent as to affect prejudicially the owner of the copyright; or

by way of trade exhibits in public; or

imports for sale or hire into any part of the King's dominions to which the Act extends (*f*),

any work which "to his knowledge" infringes copyright or would infringe copyright if it had been made within the part of the King's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place (*g*).

Copyright is also infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance (*h*) in public of the work without the consent of the owner of the copyright, unless he was not aware and had no reasonable ground for suspecting that the performance would be an infringement of copyright (*i*).

Acts not infringements of copyright.

But the following acts (i.)—(vii.) do not constitute an infringement of copyright:—

(i.) Any fair dealing with a work for the purposes of private study, research, criticism, review, or newspaper summary;

(ii.) Where the author of an artistic work (*k*) is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model, or study, made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work;

(iii.) The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings, drawings, engravings, or photographs (which are

(*f*) See sect. 25.

(*g*) Sect. 2, sub-s. 2.

(*h*) See sect. 35, sub-s. 1.

(*i*) Sect. 2, sub-s. 3.

(*k*) "Artistic work" includes works of painting, drawing, sculpture, artistic craftsmanship, architectural works of art, engravings, and photographs, ib., sect. 35, sub-s. 1.

not in the nature of architectural drawings or plans) of any architectural work of art;

(iv.) The publication in a collection, mainly composed of non-copyright matter, *bonâ fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists: Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged;

(v.) The publication in a newspaper of a report of a lecture delivered (*l*) in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given and, except whilst the building is being used for public worship, in a position near the lecturer. This provision does not affect the provisions in paragraph (i.) as to newspaper summaries;

Acts not infringement of copyright.

(vi.) The reading or recitation in public by one person of a reasonable extract from a published work (*m*);

(vii.) The publication in a newspaper of political speeches delivered at public meetings (*n*).

Nor is it an infringement of copyright in any musical work (*o*) for a person to make within the parts of the King's dominions to which the Act extends, records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves (1) that such contrivances have previously been made by, or with the consent (*p*) or acquiescence of the owner of the copyright in the work; and (2) that he has given the prescribed notice of his intention to make the contrivances, and has paid to the

(*l*) "Lecture" includes address, speech, or sermon. "Delivery" includes delivery by a mechanical instrument, sect. 35, sub-s. 1.

(*m*) Sect. 2, sub-s. 1 (i.)—(vi.).

(*n*) Sect. 20.

(*o*) See sect. 19, sub-s. 2 (ii.).

(*p*) See sect. 19, sub-s. 5.

owner of the copyright in the work the necessary royalties in respect of such contrivances (*q*). But no alterations in, or omissions from, the work reproduced, may be made, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question (*r*).

In the case of musical works published before the commencement of the Act, the conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright, and the restrictions as to alterations in or omissions from the work, do not apply, and there are different provisions as to royalties (*s*).

Infringement of literary copyright.

There are two modes in which literary copyright may be infringed, namely, either by *piracy*, or by what is termed *literary larceny*. Where a publisher in this country publishes an unauthorised edition of a work in which copyright exists, or where a man introduces to sell a foreign reprint of such a work, this is open *piracy*. Where a man pretending to be author of a book illegitimately appropriates the fruits of another man's labour, this is *literary larceny*.

There is also another mode in which literary property can be invaded which is wholly irrespective of copyright legislation, and that is where a man sells a work under the name and title of another man or another man's work; that is not an invasion of copyright, but a common law fraud which can be redressed by common law remedies (*t*).

The author of a book protected by copyright has the exclusive right to produce and reproduce the book (*u*) subject to any fair dealing therewith by another person for the purposes

(*q*) Sect. 19, sub-ss. 2 (a), (b), 3, 6; and as to notice and payment of royalties, see the Copyright Royalty System (Mechanical Musical Instruments) Regulations, St. R. & O., 1912, No. 533.

(*r*) Sect. 19, sub-s. 2 (i.).

(*s*) See sect. 19, sub-s. 7 (a), (b).

(*t*) *Dicks* v. *Yates*, 18 C. D. 76, 90; 50 L. J. Ch. 809; see *Crotch* v. *Arnold*, (1910) 54 S. J. 49.

(*u*) See Copyright Act, 1911, s. 1, sub-s. 2.

of criticism, review, or newspaper summary (*x*). But if the book is not so used but so much of it is taken that the value of the original is sensibly diminished, or the labours of the original matter are substantially and to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy (*y*). To be a piracy it is not necessary that the later work should be a substitute for the original work (*z*). All that is necessary is that so much should be taken as to affect sensibly the property of the original writer (*a*). Whether the use which has been made of a prior work is a fair and legitimate use or not, is a question not so much of kind as of degree, and depends upon the circumstances of each particular case (*b*). In many cases it is extremely difficult to draw the line between what is a legitimate and what is an unlawful and colourable use of a prior work (*c*). The question in all cases is whether a material and substantial part of the prior work has been taken (*d*). The question of piracy turns most commonly upon the extent or quantity of the materials taken, but it does not depend solely upon the quantity, as regard must also be had to the value of what is taken (*e*).

In determining whether an unfair use has been made of a prior work, the nature of the two works, and the likelihood or unlikelihood of their entering into competition with each other is not only a relevant, but may be a determining factor of the case. But an unfair use may be made of one book in

(*x*) Sect. 2, sub-s. 1 (i.). As to extracts for use of schools, see sect. 2, sub-s. 1 (iv.).

(*y*) *Scott* v. *Stanford*, 3 Eq. 718; 36 L. J. Ch. 729; *Smith* v. *Chatto*, 23 W. R. 290; (1874) W. N. 231; *Weatherby* v. *International Horse Agency Co.*, (1910) 2 Ch. p. 325; 79 L. J. Ch. p. 613; Copyright Act, 1911, s. 1, sub-s. 2, s. 2, sub-s. 1.

(*z*) *Bohn* v. *Bogue*, 10 Jur. 420; 77 R. R. 872. See *Sweet* v. *Shaw*, 1 Jur. 917; 3 Jur. 217; 8 L. J. Ch. 216.

(*a*) *Bradbury* v. *Hotten*, L. R. 8 Ex. 1; 42 L. J. Ex. 28.

(*b*) *Sweet* v. *Benning*, 16 C. B. 485; 24 L. J. C. P. 175; *Moffatt* v. *Gill*, 50 W. R. 528.

(*c*) Ib.

(*d*) *Chatterton* v. *Cave*, 3 A. C. 483; 47 L. J. C. P. 545. See Copyright Act, 1911, s. 1, sub-s. 2, s. 2, sub-s. 1.

(*e*) See *Bramwell* v. *Halcomb*, 3 M. & C. p. 738; 45 R. R. 378; *Tinsley* v. *Lacy*, 1 H. & M. 747; 34 L. J. Ch. 535; *Scott* v. *Stamford*, 3 Eq. 718; 36 L. J. Ch. 729; *Trade Auxiliary Co.* v. *Middlesborough Tradesmen's Association*, 40 C. D. 425; 58 L. J. Ch. 293.

the preparation of another, even if there is no likelihood of competition between them (*f*).

Extracts.

In taking extracts or quotations from a book for the purposes of criticism, review, or newspaper summary, considerable licence is allowed (*g*), for the selection of extracts for such purposes, so far from being injurious, is often beneficial to the sale of the books from which they are taken (*h*). But there is a limit to the selection of passages even for the purposes of criticism or review, though it is not easy to define that limit (*i*). If the selection is made fairly for the purpose of criticising or questioning the opinions expressed therein, or of explaining the criticism, passages of considerable length or of much value may be taken (*k*), but a reviewer may not, under the pretence of criticism, appropriate a large or vital part of the book of another. If the citations, though purporting to be made with a view to criticism, go in part to supersede the original work, and to substitute the review for it, such a use is deemed in law a piracy (*l*). Thus, where a man had published a book giving specimens of modern English poetry, with an original essay and biographical notices, and inserted extracts from a poem written by Campbell, an injunction was granted against the publication (*m*).

Law reports.

Where the proprietor of a Law Digest copied from the *Jurist* the headnotes of the reported cases, it was held to be an abuse of the right of extract (*n*). So, also, a defendant was restrained from copying reports of law cases from a work of the plaintiff (*o*), and the publication of a series of reports

(*f*) *Weatherby* v. *International Horse Agency Co.*, (1910) 2 Ch. p. 305; 79 L. J. Ch. p. 612.

(*g*) *Bowerth* v. *Wilkes*, 1 Camp. 94; 10 R. R. 642; *Whittingham* v. *Wooler*, 2 Sw. 428; and see Copyright Act, 1911, s. 2, sub-s. 1 (i.), (vi.); as to extracts for the use of schools, Ib. s. 2, sub-s. 1 (iv.).

(*h*) *Bell* v. *Whitehead*, 8 L. J. Ch. N. S. 141.

(*i*) Ib.

(*k*) Ib. See *Bowerth* v. *Wilkes*, 1 Camp. 94; 10 R. R. 642.

(*l*) *Mawman* v. *Tagg*, 2 Russ. p. 393; 26 R. R. 112; *Maxwell* v. *Somerton*, 22 W. R. 313; (1874) W. N. 19; *Smith* v. *Chatto*, 23 W. R. 290; (1874) W. N. 231.

(*m*) *Campbell* v. *Scott*, 11 Sim. 31; 11 L. J. Ch. 166.

(*n*) *Sweet* v. *Benning*, 16 C. B. 459; 24 L. J. C. P. 175.

(*o*) *Sweet* v. *Shaw*, 1 Jur. 917 3 Jur. 217; 8 L. J. Ch. 216.

containing reprints of cases or judgments from the *Law Reports* was restrained as an infringement of copyright in the *Law Reports* (*p*).

Colourable imitations.

The most frequent form of piracy which comes before the Court is where the matter of a prior publication is adopted, imitated or transferred, with more or less colourable alteration to disguise the piracy.

Dictionaries, gazetteers, grammars, arithmetic, or other school books, encyclopedias, guide-books, and similar publications, are a class of works in which much of the matter must be identical, and no great novelty is practicable (*q*). In such works the recurrence of passages identically the same may be sufficient to be a conclusive proof of piracy (*r*). Where the resemblance does not amount to an identity of particular passages, the question becomes in substance whether there be such a conformity and similitude between the two works that the writer of the one must have copied or made an undue use of the other. What degree of resemblance will authorise the inference that one book is a copy or colourable imitation of another is often a question of great nicety, and depends on the circumstances of each particular case (*s*).

A man is not debarred from consulting a prior work on the same subject. He may examine it to see whether it contains anything which he has forgotten, or whether any reference is

(*p*) *Incorporated Council of Law Reporting* v. *William Green and Sons*, (1912) W. N. 243.

(*q*) See *Jarrold* v. *Houlstone*, 3 K. & J. 708; *Morris* v. *Ashbee*, 7 Eq. 34; 19 L. T. 559; *Nisbet & Co.* v. *The Golf Agency*, (1907) 23 T. L. R. 370. As to school books, see Copyright Act, 1911, s. 2 (i.), (iv.).

(*r*) *Matthewson* v. *Stockdale*, 12 Ves. 270; *Mawman* v. *Tegg*, 2 Russ. 385; 26 R. R. 112; *Jarrold* v. *Houlstone*, 3 K. & J. 708; *Hotten* v. *Arthur*, 1 H. & M. 603; 32 L. J. Ch. 771; see *Exchange Telegraph Co.* v. *Howard, etc. Press Agency*, (1906) 22 T. L. R. p. 378; *Nisbet & Co.* v. *The Golf Agency*, (1907) 23 T. L. R. 370; *Robl* v. *Palace Theatre Co.*, (1911) 28 T. L. R. p. 72, as to similar passages.

(*s*) *Mawman* v. *Tegg*, 2 Russ. 394; 26 R. R. 112; *Stevens* v. *Wildy*, 19 L. J. Ch. 190; *Jarrold* v. *Houlstone*, 3 K. & J. 708; *Hotten* v. *Arthur*, 1 H. & M. 603; 32 L. J. Ch. 771; *Pike* v. *Nicholas*, 5 Ch. 252; 39 L. J. Ch. 435; see *Exchange Telegraph Co.* v. *Howard, etc. Press Agency*, (1906) 22 T. L. R. p. 378; *Robl* v. *Palace Theatre Co.*, (1911) 28 T. L. R. p. 72

made there to some other work bearing on the subject (*t*), and he may if led by the examination to refer to older writers use the same passages in the older writers which have been used in the prior work (*u*). The compiler of a dictionary or guide-book containing information derived from sources common to all, which must of necessity be identical in all cases, if correctly given, is not however entitled to spare himself the labour and expense of original inquiry by adopting and republishing the information contained in previous works on the same subject. He must obtain and work out the information independently for himself, and the only legitimate use which he can make of previous works is for the purpose of verifying the correctness of his results (*x*).

Dramatic and musical copyright.

To constitute an infringement of a dramatic (*y*) work, a material and substantial part of the work must be taken. Though an appreciable part be taken, it does not follow as a consequence of law that the plaintiff's right is invaded, if such part be unimportant and trifling in relation to the effect of the whole composition (*z*). A dramatic representation in which a substantial and material part of the music of an opera has been performed constitutes an infringement of the sole right of performing that music, even though the operatic score may have been obtained by independent labour

(*t*) *Jarrold* v. *Houlston*, 3 K. & J. 716; *Kelly* v. *Morris*, 1 Eq. 697; 35 L. J. Ch. 423.

(*u*) *Pike* v. *Nicholas*, 5 Ch. 252; 39 L. J. Ch. 435.

(*x*) *Kelly* v. *Morris*, 1 Eq. 697; 35 L. J. Ch. 423; *Morris* v. *Ashlee*, 7 Eq. 40; 19 L. T. 550; *Morris* v. *Wright*, 5 Ch. p. 285; 18 W. R. 227; *Hogg* v. *Scott*, 18 Eq. p. 457; 43 L. J. Ch. 705. See *Weatherby & Sons* v. *International Horse Agency Co.*, (1910) 2 Ch. 297; 79 L. J. Ch. 609.

(*y*) Copyright in the case of a dramatic work includes the sole right to convert it into a novel or other non-dramatic work: Copyright Act, 1911, s. 1, sub-s. 2 (b). "Dramatic work" includes any piece for recitation, choreographic work, or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character: Ib., s. 35, sub-s. 1. Under the former Acts, scenic effects were not protected, see *Tate* v. *Fullbrook*, (1908) 1 K. B. 821; 77 L. J. K. B. 577.

(*z*) *Chatterton* v. *Cave*, 3 A. C. 483; 47 L. J. C. P. 545; *Robl* v. *Palace Theatre Co.*, (1911) 28 T. L. R. 69.

bestowed upon an unprotected pianoforte arrangement (*a*). So also is there an infringement of the right to a musical composition where a man appropriates a material part of the music of an opera and so publishes it in the form of quadrilles and waltzes that the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. The adding of variations makes no difference in the principle (*b*).

But the representation of a dramatic piece substantially similar to a piece previously produced, is not an infringement of copyright in the earlier work if both works have been produced from the common stock of dramatic ideas and their similarity is a mere coincidence (*c*).

Photographs.

Where a photograph is ordered by a customer who pays for it in the ordinary way, the copyright in the photograph is in the customer in the absence of any agreement to the contrary (*d*), and the photographer will be restrained from selling or exhibiting copies of it without the customer's consent (*e*). Apart from copyright, the photographer might be restrained on the ground of breach of the implied contract not to use the negative for such purposes and also on the ground that such a sale or exhibition would be a breach of confidence (*f*).

Where the photographer asks a customer to sit for his photograph free of charge, the copyright in the photograph *primâ facie* belongs to the photographer (*g*). The question, therefore, is: Was the plate or other original taken for or on behalf of the customer for valuable consideration?

(*a*) *Fairlie* v. *Boosey*, 4 A. C. 711; 48 L. J. Ch. 697.

(*b*) *D'Almaine* v. *Boosey*, 1 Y. & C. 288; 4 L. J. (N. S.) Ex. 21; 41 R. R. 273; see *Chappell* v. *Sheard*, 1 Jur. N. S. 996.

(*c*) *Robl* v. *Palace Theatre Co.*, (1911) 28 T. L. R. 69. See *Corelli* v. *Gray*, (1913) 29 T. L. R. 570. Under the Act, as under the former law, no absolute monopoly is given to an author, but merely the negative right, to prevent appropriation of his work: *Corelli* v. *Gray*, *supra*.

(*d*) Copyright Act, 1911, s. 5, sub-s. (1) (a). See *Boucas* v. *Cooke*, (1903) 2 K. B. 227; 72 L. J. K. B. 741.

(*e*) *Pollard* v. *Photographic Co.*, 40 C. D. 345; 58 L. J. Ch. 251; *Stelall* v. *Houghton*, (1901) 18 T. L. R. 126; *Boucas* v. *Cooke*, *supra*.

(*f*) *Pollard* v. *Photographic Co.*, *supra*.

(*g*) See *Boucas* v. *Cooke*, (1903)

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If it was, the copyright is the customer's, if not, it is the photographer's (*h*). Where a photographer was allowed to take photographs of a school at his own risk, the school proprietor being at liberty to buy copies or not as he thought fit, and some copies were subsequently purchased by the school proprietor, it was held that the photographs had been taken on behalf of the school proprietor for valuable consideration, and that the copyright belonged to him, and not to the photographer (*i*).

Rights of the writer and receiver of a letter.

The receiver of a letter has a right to the possession of it, and may take proceedings at law for the recovery of it if it be taken out of his possession (*k*), but he has no right to publish the letter without the consent of the writer. A man by sending a letter to another gives him a right to read and keep the letter, but does not give him the right to publish it. The author of the letter is the first owner of the copyright therein, and accordingly has the sole right to publish the letter (*l*), and his right descends to his legal personal representatives (*m*).

If the letters are returned to the writer by the receiver, the right of possession of them is then abandoned; and if the receiver has kept copies he cannot publish them without the writer's consent (*n*). The receiver of a letter may however publish it when it is necessary for the purposes of justice publicly administered in the ordinary mode of proceeding, or

2 K. B. pp. 235, 236; 72 L. J. K. B. p. 744.

(*h*) Ib.; and see Copyright Act, 1911, s. 5, sub-s. (1) (a).

(*i*) *Stackemann* v. *Paton*, (1906) 1 Ch. 774; 75 L. J. Ch. 590.

(*k*) *Oliver* v. *Oliver*, 11 C. B. N. S. 139; 31 L. J. C. P. 4; *Thurston* v. *Charles*, (1905) 21 T. L. R. 659.

(*l*) *Pope* v. *Curl*, 2 Atk. 342; *Gee* v. *Pritchard*, 2 Sw. 402, 425; 19 R. R. 87; *Lytton* v. *Devey*, 54 L. J. Ch. 293; *Pollard* v. *Photographic Co.*, 40 C. D. p. 352; 58 L. J. Ch. 251; *Macmillan* v. *Dent*, (1907) 1 Ch. p. 129; 76 L. J. Ch. p. 150; *Philip* v. *Pennell*, (1907) 2 Ch. 577, 586; 76 L. J. Ch. 663; and see Copyright Act, 1911, s. 1, sub-ss. 1, 2; s. 5, sub-s. 1.

(*m*) *Thompson* v. *Stanhope*, Amb. 737; *Granard* v. *Dunkin*, 1 Ba. & Be. 207; 12 R. R. 18; *Macmillan* v. *Dent*, (1907) 1 Ch. p. 131; 76 L. J. Ch. 136; *Philip* v. *Pennell*, (1907) 2 Ch. p. 585; 76 L. J. Ch. 663; and see Copyright Act, 1911, s. 17.

(*n*) *Thompson* v. *Stanhope*, Amb. 739; *Gee* v. *Pritchard*, 2 Sw. p. 418; 19 R. R. 97.

to vindicate his character from an accusation publicly made by the writer (*o*).

The letter of an agent or a servant, for instance, written on behalf of or by the direction of the principal or the master, is the property of the principal or the master, and not of the agent or servant: the latter has no such property in it as to entitle him to prevent its publication, although he swears it was written in his private capacity; and the rule is apparently the same even when the letter has been only apparently written on behalf of the principal or master (*p*).

Lectures.

The author of a lecture has copyright therein as in any other literary work, and accordingly has the sole right to deliver (*q*) it in public, or publish it (*r*) or any translation of it (*s*). But this right of the author is, as in the case of other works, subject to any fair dealing with the lecture by other persons for the purposes of private study, research, criticism, review, or newspaper summary (*t*), and, in the case of a published lecture, is subject to the rights of other persons to read or recite in public any reasonable extracts from it (*u*).

A lecture delivered in public may also be reported in newspapers, unless reports are prohibited by the lecturer in the manner provided by the Act (*x*).

When persons are admitted as pupils, or otherwise, to hear lectures [illegible] on the implied confidence or contract that they will [illegible] any means to injure or to take away the rights of the lecturer in his own lecture. Accordingly, if a

(*o*) *Perceval* v. *Phipps*, 2 V. & B. p. 25; 13 R. R. 1; *Gee* v. *Pritchard*, 2 Sw. 413; 19 R. R. 87; *Lytton* v. *Davey*, 54 L. J. Ch. 293; (1884) W. N. 203; *Hopkinson* v. *Burghley*, 2 Ch. 447; 36 L. J. Ch. 504; *Labouchere* v. *Hess*, 77 L. T. 559; *Philip* v. *Pennell*, (1907) 2 Ch. pp. 587, 588; 76 L. J. Ch. 663.

(*p*) *Howard* v. *Gunn*, 32 Beav. 462; see, as to the right of a solicitor to copies of letters relating to his client's business, *Re Thomson*, 20 Beav. 545; *Re Wheatcroft*, 6 C. D. 97; 46 L. J. Ch. 669.

(*q*) Including delivery by mechanical instruments: Copyright Act, 1911, sect. 35, sub-s. 1.

(*r*) Delivery in public of a lecture is not "publication" for the purposes of the Copyright Act, 1911: sect. 1, sub-s. 3.

(*s*) Sect. 1, sub-s. 2 (a).

(*t*) Sect. 2, sub-s. 1 (i.).

(*u*) Sect. 2, sub-s. 1 (vi.).

(*x*) Sect. 2, sub-s. 1 (v.), *ante*, p. 401.

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person attending such lectures either publishes them or furnishes another with the means of publishing them, the Court will restrain the publication as a breach of the implied confidence or contract (*y*).

SECT. 3.—CIVIL REMEDIES FOR THE INFRINGEMENT OF COPYRIGHT.

Civil remedies for infringement of copyright.

Where copyright in any work has been infringed, the owner of the copyright is, except as otherwise provided by the Copyright Act, 1911 (*z*), entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise as are or may be conferred by law for the infringement of a right (*a*).

Restriction on remedies in case of architecture.

Where the construction of a building or other structure which infringes, or which, if completed, would infringe the copyright in some other work, has been commenced, the owner of the copyright is not entitled to obtain an injunction to restrain the construction of such building or structure or to order its demolition (*b*).

Interlocutory injunction.

The jurisdiction of the Court in restraining by interlocutory injunction the violation of copyright is in aid of the legal right, and is founded upon the necessity of protecting the property from serious damage pending the trial of the right (*c*). The Court proceeds on the assumption that the person who makes the application has the right which he asserts, but needs the aid of the Court for the purpose of protecting his property from damage pending the trial of the right (*d*).

If the Court is satisfied that the plaintiff's title is good, and

(*y*) See *Abernethy* v. *Hutchinson*, 3 L. J. (O. S.) Ch. 209; 26 R. R. 237; *Nichols* v. *Pitman*, 26 C. D. 374; 53 L. J. Ch. 552; *Caird* v. *Sime*, 12 A. C. 326; 57 L. J. P. C. 2. As to right of a pupil in a conveyancer's chambers to keep and use copies of the conveyancer's precedents, see *Lamb* v. *Evans*, (1893) 1 Ch. p. 231; 62 L. J. Ch. p. 409.

(*z*) See Copyright Act, 1911, s. 8, innocent infringer, *post*, 416, s. 9, sub-s. 1, *infra*.

(*a*) Sect. 6, sub-s. 1. As to summary remedies, see sects. 11—13; ss. 7 and 8 of 25 & 26 Vict. c. 68, 2 Edw. 7, c. 15, and 6 Edw. 7, c. 36.

(*b*) Sect. 9, sub-s. 1.

(*c*) *Saunders* v. *Smith*, 3 M. & C. p. 728; 7 L. J. (N. S.) Ch. 227; 45 R. R. 367.

(*d*) Ib. See *Litholite Co.* v. *Travis and Insulators, Ltd.*, (1913) 30 R. P. C. 266.

that there has been a piracy, it may interfere at once, and restrain the piracy *simpliciter* by injunction; but this course will not be adopted except where the title and the fact of its violation are clearly made out. If the plaintiff's title is not clear, or the fact of its violation is denied, the course of the Court is either to grant the injunction pending the trial of the legal right, or to direct the motion to stand over until the hearing, on the terms of the defendant keeping an account. Which of these alternatives shall be adopted depends on the discretion of the Court, according to the case made out (*e*). If irreparable damage would be caused to the property of the plaintiff by the refusal of the Court to interfere, the injunction will be granted (*f*). If, on the other hand, an injunction would be an extreme hardship on the defendant as compared with the inconvenience to which the plaintiff would be put by being required in the first instance to establish his legal right, the other alternative will be adopted (*g*). Where the work is of a transitory or ephemeral character, greater caution is necessary in exercising the jurisdiction than when the book is of a more permanent character (*h*).

Where the plaintiff's title is clear, an injunction may be granted although there is only one instance of its infringement by the defendant (*i*).

Parties.

If there has been a complete legal assignment of the copyright in a work, the assignor should not be made a party to proceedings for an infringement after the assignment (*k*). An assignment qualified by a contemporaneous undertaking not to reproduce the work without the consent of the assignor, is not a valid assignment so as to enable the assignee to sue for infringement without joining the assignor (*l*).

(*e*) *Bramwell* v. *Halcomb*, 3 M. & C. p. 739; 45 R. R. 378.

(*f*) *Sweet* v. *Shaw*, 8 L. J. (N. S.) Ch. 216; *Dickens* v. *Lee*, 8 Jur. p. 185. See *Litholite Co.* v. *Travis and Insulators*, (1913) 30 R. P. C. 266.

(*g*) *Saunders* v. *Smith*, 3 M. & C. 737; 7 L. J. (N. S.) Ch. 227; 45 R. R. 367; *Bramwell* v. *Halcomb*, 3 M. & C. p. 739; 45 R. R. 378.

(*h*) *Matthewson* v. *Stockdale*, 12 Ves. 275; *Spottiswoode* v. *Clar'* 2 Ph. 154; 78 R. R. 63.

(*i*) *Cooper* v. *Whittingham*, 15 C. D. 501; 49 L. J. Ch. 752; *Butterworth* v. *Kelly*, 4 T. L. R. 430.

(*k*) See Copyright Act, 1911, s. 5, sub.-ss. 2, 3, s. 6.

(*l*) *Landeker and Brown* v. *Wolff*, (1907) 52 S. J. 45.

The grantee of a sole licence to produce a play for a limited period cannot sue in his own name to restrain the production of the play (*m*).

A mere agent for sale of a work has not such an interest in the work as will entitle him to sue for infringement of copyright therein (*n*).

One action cannot be maintained against several persons for distinct invasions of copyright (*o*).

Presumption as to plaintiff's ownership of copyright.

In an action for infringement of copyright in a work, the work is presumed to be one in which copyright subsists, and the plaintiff is presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff. Where any such question is in issue, then—

(i.) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated is, unless the contrary is proved, presumed to be the author of the work;

(ii.) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated is, unless the contrary is proved, presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein (*p*).

Delay and acquiescence.

A man who seeks the aid of the Court for the protection of his copyright from violation must show due diligence in coming to the Court. Delay which may not deprive a plaintiff

(*m*) *Neilson* v. *Horniman*, (1909) 26 T. L. R. 188.

(*n*) *Nichol* v. *Stockdale*, 3 Sw. 687; and see *Dental Manufacturing Co.* v. *De Trey & Co.*, (1912) 3 K. B. 76; 81 L. J. K. B. 1162 (case of passing-off).

(*o*) *Dilly* v. *Doig*, 2 Ves. 486; see *Hudson* v. *Maddison*, 12 Sim. 416; 11 L. J. Ch. 55; 56 R. R. 91.

(*p*) Copyright Act, 1911, s. 6, sub-s. 3.

of his right to an injunction at the hearing (*q*) will be fatal to the application for an interlocutory injunction unless it can be satisfactorily accounted for (*r*). Nor will relief be granted if the plaintiff's own conduct has led to the state of things that occasions the application (*s*).

Conduct of plaintiff.

The interference of the Court by injunction being founded on pure equitable principles, a man who comes to the Court must be able to show that his own conduct in the transaction has been consistent with equity. A book accordingly which is itself piratical cannot be protected from invasion (*t*), nor will the Court protect by injunction a work which is of an immoral, indecent, seditious, or libellous nature (*u*) or which is fraudulent (*x*).

Extent of the injunction.

If a case has been made out for an injunction, the Court has then to determine whether the injunction shall be against the whole work or only against a part of it. The extent to which the injunction ought to go must depend in each case upon the extent of the piracy and the nature of the work (*y*). If the pirated matter is considerable in amount, and is so intermixed with the original matter that it cannot be separated, the injunction will go against the whole work generally (*z*). Notwithstanding that the effect may be to destroy altogether the use and value of the original matter, the Court will not

(*q*) *Hogg* v. *Scott*, 18 Eq. 444; 48 L. J. Ch. 705.

(*r*) *Mawman* v. *Tegg*, 2 Russ. 393; 26 R. R. 112; *Baily* v. *Taylor*, 1 R. & M. 73; 8 L. J. Ch. 49; 32 R. R. 146; *Lewis* v. *Chapman*, 3 Beav. 133; *Burton* v. *James*, 5 De G. & Sm. 84; 90 R. R. 15; *Hogg* v. *Scott*, 18 Eq. 444; 43 L. J. Ch. 705; *Weldon* v. *Dicks*, 10 C. D. p. 262; 48 L. J. Ch. 201; *Robl* v. *Palace Theatre Co.*, (1911) 28 T. L. R. 69.

(*s*) *Rundall* v. *Murray*, Jac. p. 316; 23 R. R. 75.

(*t*) *Cary* v. *Faden*, 5 Ves. 24.

(*u*) *Stockdale* v. *Onwhyn*, 5 B. & C. 173; 4 L. J. (O. S.) K. B. 122; 29 R. R. 207; *Southey* v. *Sherwood*, 2 Mer. 435; *Lawrence* v. *Smith*, Jac. 471; 23 R. R. 123; *Lord Byron* v. *Dugdale*, 1 L. J. Ch. 233; *Baschet* v. *London Illustrated Standard Co.*, (1900) 1 Ch. 73; 69 L. J. Ch. 35.

(*x*) *Wright* v. *Tallis*, 1 C. B. 893; 14 L. J. C. P. 283; 68 R. R. 852; *Slingsby* v. *Bradford Patent Truck Co.*, (1906) W. N. 51.

(*y*) *Lewis* v. *Fullarton*, 2 Beav. 6; 8 L. J. (N. S.) Ch. 291; 50 R. R. 84.

(*z*) *Mawman* v. *Tegg*, 2 Russ. p. 397; 26 R. R. 112; *Lewis* v. *Fullarton*, *supra*; *Kelly* v. *Morris*, 1 Eq. 697; 35 L. J. Ch. 423.

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refrain from granting an injunction. "If," said Lord Eldon (*a*), "the parts which have been copied cannot be separated from those which are original without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must abide the consequence of so doing. If a man mixes up what belongs to him with what belongs to another, and the mixture be forbidden by law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any way to mix my literary work with his own, he must be restrained from publishing the literary work which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction which restrained the publication prevents also the publication of his literary matter, he has only himself to blame" (*b*).

Action lies for infringement without proof of damage.

An action will lie to restrain the infringement of copyright even if no damage be shown (*c*).

When injunction will not be granted.

If, however, the pirated matter is not considerable in quantity or of much value in quality, and quite out of proportion to the mass of original matter, the Court will not always grant an injunction, but may leave the plaintiff to his remedy by damages (*d*).

An injunction — when granted.

There may, however, be cases where the pirated matter, though small in quantity, is so material and of such value in quality that the Court may feel bound to interfere by injunction (*e*). In a case where the pirated matter formed a very small portion of the plaintiff's work, but constituted the bulk of the defendant's work, an injunction was granted (*f*).

(*a*) *Mawman* v. *Tegg*, 2 Russ. p. 390; 23 R. R. 112.

(*b*) *Low* v. *Ward*, 6 Eq. 415; 37 L. J. Ch. 841.

(*c*) *Weatherby* v. *International Horse Agency and Exchange Co.*, (1910) 2 Ch. p. 305; 79 L. J. Ch. 609.

(*d*) *Mawman* v. *Tegg*, 2 Russ. p. 394; 26 R. R. 112; *Baily* v. *Taylor*, 1 R. & M. 73; 8 L. J. Ch. 49; 32 R. R. 146; *Haufstaengl* v. *W. H. Smith*, (1905) 1 Ch. 519, 528; 74 L. J. Ch. 304.

(*e*) *Bohn* v. *Bogue*, 10 Jur. 420; 77 R. R. 872; *Saunders* v. *Smith*, 3 M. & C. p. 737; 7 L. J. (N. S.) Ch. 227; 45 R. R. 367; *Bramwell* v. *Halcomb*, 3 M. & C. 738; 45 R. R. 378; *Bell* v. *Whitehead*, 8 L. J. Ch. 141; *Chatterton* v. *Cave*, 3 A. C. pp. 497, 498; 47 L. J. C. P. 545.

(*f*) *Kelly* v. *Hooper*, 4 Jur. 21.

In a case where to grant an injunction against the whole work would be a harsh step, the Court will not suspend the publication altogether until the hearing of the cause (*g*).

If the pirated matter can be separated from the original matter, the injunction will issue only against that particular part (*h*).

Inspection of infringing work by the Court.

The Court will not grant an injunction against the whole of a book generally until it has ascertained by inspection or otherwise the quantity of the pirated matter (*i*). In *Lewis* v. *Fullarton* (*k*), a considerable quantity of matter having been shown to have been pirated, Lord Langdale considered himself justified in coming to the conclusion that other parts also of the work had been pirated, and granted an injunction in general terms without ascertaining the whole amount of the pirated matter. But in *Jarrold* v. *Houlstone* (*l*), Wood, V.-C., said the Court should grudge no labour in ascertaining how far the injunction should extend. The Court may leave it to the defendant to state in his affidavit exactly how much and what parts he has copied. If there is no reason to suppose a fraudulent intent on his part, this course may be adopted (*m*).

Form of injunction at the trial.

As copyright is a right of limited duration, the order of the Court does not restrain infringement generally, but "until" the expiration of the plaintiff's copyright in the work (*n*).

Innocent infringer.

A man whose copyright has been infringed is entitled to relief although there may have been no fraudulent intention on the part of the defendant (*o*). But where the defendant

(*g*) *Ainsworth* v. *Beatley*, 14 W. R. 630.

(*h*) *Jarrold* v. *Houlstone*, 3 K. & J. 708; 112 R. R. 357; *Morris* v. *Ashbee*, 7 Eq. p. 41; 19 L. T. 550. See as to form of Order *Smith* v. *Chatto*, 23 W. R. 290; *Warne & Co.* v. *Seebohm*, 39 C. D. 73; 57 L. J. Ch. 689.

(*i*) *Mawman* v. *Tegg*, 2 Russ. p. 398; 26 R. R. 112.

(*k*) 2 Beav. 6; 8 L. J. (N. S.) Ch. 291; 50 R. R. 84.

(*l*) 3 K. & J. 708; 112 R. R. 357.

(*m*) *Mawman* v. *Tegg*, 2 Russ. pp. 395, 404; 26 R. R. 112; *Jarrold* v. *Houlstone*, 3 K. & J. 708; 112 R. R. 357.

(*n*) *Savory* v. *Gypticum Oil Co.*, (1904) 48 S. J. 573.

(*o*) *Reade* v. *Conquest*, 11 C. B. N. S. 479; 31 L. J. C. P. 157; *Scott* v. *Stamford*, 3 Eq. 718; 13 L. J. Ch. 729; *Weatherby* v. *International Horse Agency Co.*, (1910) 2 Ch. p. 305; 79 L. J. Ch. p. 613.

pleads that he was not aware of the existence of the copyright in the work, and proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work, the plaintiff is not entitled to any remedy other than an injunction or interdict in respect of the infringement (*p*).

Evidence of fraudulent intent.

Where a defendant denies that he has made any use of the plaintiff's work, but the Court is of opinion, either from the occurrence of the same blunders or misprints in both publications (*q*), or from other causes, that the statement is false, the denial is evidence of a fraudulent intent, and an injunction will issue in cases in which it might not have gone had he admitted that he had made a fair use of, or been under obligation to, the plaintiff's work (*r*).

Damages.

A plaintiff whose copyright has been infringed is entitled to recover damages for the invasion of his right (*s*) without having to prove that he has sustained any specific damage (*t*). But he cannot recover damages against a defendant who pleads that he was not aware of the existence of the copyright in the work, and proves that at the date of the infringement, he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work (*u*).

Assessment of damages.

The principle of assessing damages in all cases of literary piracy is that the defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's, and to pay to the plaintiff the profit which he would have received from the sale of so many additional copies (*x*).

(*p*) Copyright Act, 1911, s. 8.

(*q*) *Mawman* v. *Tagg*, 2 Russ. p. 394; 26 R. R. 112; *Spiers* v. *Brown*, 6 W. R. 352; *Hotten* v. *Arthur*, 1 H. & M. 603; 32 L. J. Ch. 773.

(*r*) *Spiers* v. *Brown*, *supra*; *Jarrold* v. *Houlston*, 3 K. & J. p. 722; 112 R. R. 357.

(*s*) Copyright Act, 1911, s. 6, sub-s. 1.

(*t*) *Exchange Telegraph Co.* v. *Gregory & Co.*, (1896) 1 Q. B. p. 153; 65 L. J. Q. B. 262; *Haufstaengl* v. *W. H. Smith*, (1905) 1 Ch. 528; 74 L. J. Ch. 304; and see *Weatherby* v. *International Horse Agency and Exchange Co.*, (1910) 2 Ch. p. 305; 79 L. J. Ch. 609.

(*u*) Copyright Act, 1911, s. 8.

(*x*) *Pike* v. *Nicholas*, 5 Ch. 260 (n.); 38 L. J. Ch. 529; see *Muddock* v. *Blackwood*, (1898) 1 Ch. p. 64; 67 L. J. Ch. 6.

Account of profits.

When an injunction is granted at the trial, the plaintiff is also entitled to an account of profits (*y*), "or" to an inquiry as to damages (*z*).

If the account is small, it is usually waived (*a*), but when it is not waived, the Court grants it upon principles which have been thus stated by Wigram, V.-C., in *Colburn* v. *Simms* (*b*). "The Court does not by an account accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The Court by the account, as the nearest approximation which it can make to justice, takes from the wrongdoer all the profits he has made by his piracy, and gives them all to the party who has been injured. In doing that the Court may give the injured party more in fact than he is entitled to, for *non constat* that a single additional copy of the more expensive work would have been sold, if the injury by the sale of the cheaper work had not been committed." The account is limited to the net profits actually made and the monies actually received by the wrongdoer (*c*).

Discovery.

The defendant must, if required to do so for the purposes of the account or the inquiry as to damages, set out the number of copies containing pirated matter which have been sold by him (*d*). The plaintiff is entitled to continue the suit until the discovery be given (*e*).

(*y*) Copyright Act, 1911, s. 6, sub-s. 1.

(*z*) Ib. See *Baily* v. *Taylor*, 1 R. & M. p. 75; 8 L. J. Ch. 49; 32 R. R. 146; *Hole* v. *Bradbury*, 12 C. D. p. 899; 48 L. J. Ch. 673; *Muddock* v. *Blackwood*, (1898) 1 Ch. p. 64; 67 L. J. Ch. 6; *Bowden* v. *Amalgamated Pictorials Co.*, (1911) 1 Ch. p. 392; 80 L. J. Ch. p. 295; *Corelli* v. *Gray*, (1913) 29 T. L. R. 72.

(*a*) *Fradella* v. *Weller*, 2 R. & M. 247; 34 R. R. 81.

(*b*) 2 Hare, p. 560; 12 L. J. Ch. 388; 62 R. R. 225.

(*c*) *Delfe* v. *Delamotte*, 3 K. & J. 581; 112 R. R. 292.

(*d*) *Stevens* v. *Brett*, 12 W. R. 572.

(*e*) See *Colburn* v. *Simms*, 2 Hare, 543; 12 L. J. Ch. 388; 62 R. R. 225; *Kelly* v. *Hooper*, 1 Y. & C. C. C. 197; *Warne & Co.* v. *Seebohm*, 39 C. D. pp. 82, 83; 57 L. J. Ch. 689.

Delivery up of infringing copies.

All infringing copies (*f*) of any work in which copyright subsists, or of any substantial part thereof, and all plates (*g*) used or intended to be used for the production of such infringing copies, become the property of the owner of the copyright, who may take proceedings to recover possession of them or in respect of the conversion of them (*h*). But this provision does not apply in the case of a building or other structure which infringes, or which if completed would infringe the copyright in some other work (*i*).

The Court has also power under its general jurisdiction in an action for infringement to order delivery up to the plaintiff of infringing copies of a work (*k*), or, when the defendant's copies infringe in part only, and the infringing parts can be severed, to order delivery up of such infringing parts (*l*).

Costs.

The costs of all parties in any proceedings in respect of the infringement of copyright are in the absolute discretion of the Court (*m*).

A plaintiff whose copyright is invaded is *primâ facie* entitled to an injunctio[n] with costs (*n*), but as costs are in the discretion of the Court, the plaintiff may be deprived of his costs if he has acted unreasonably (*o*). The plaintiff is not bound, as a general rule, to give notice to the defendant before serving him with the writ in the action (*p*); and it

(*f*) *I.e.*, all copies, including any colourable imitation made or imported in contravention of the provisions of the Copyright Act, 1911: see sect. 35, sub-s. 1.

(*g*) See sect. 35, sub-s. 1.

(*h*) Sect. 7.

(*i*) Sect. 9, sub-s. 2.

(*k*) *Prince Albert* v. *Strange*, 2 De G. & Sm. 652, 707; 18 L. J. Ch. 120; 79 R. R. 307; *Hole* v. *Bradbury*, 12 C. D. p. 903; 48 L. J. Ch. 673; see *Mansell* v. *Valley Printing Co.*, (1908) 1 Ch. p. 575; (1908) 2 Ch. 141.

(*l*) *Warne & Co.* v. *Seebohm*, 39 C. D. pp. 82, 83; 57 L. J. Ch. 689; *Boosey* v. *Whight* (*No.* 2), 81 L. T. 265.

(*m*) Copyri[gh]t Act, 1911, s. 6 sub-s. 2.

(*n*) *Cooper* v. *Whittingham*, 1[5] C. D. p. 507; 49 L. J. Ch. 52 *Weatherby & Sons* v. *International Horse Agency Co.*, (1910) 2 Ch p. 305; 79 L. J. Ch. p. 613.

(*o*) *Dick* v. *Brooks*, 15 C. D. 41 49 L. J. Ch. 812; *Walter* v. *Steinkopff*, (1892) 3 Ch. 489; 61 L. J Ch. 521; *Haufstaengl* v. *Smith* (1905) 1 Ch. 528; 74 L. J. Ch. 30 (damages); see *Burberrys* v. *Wa kinson*, (1906) 23 R. P. C. 141.

(*p*) *Goodhart* v. *Hyett*, 25 C. D

is immaterial that the defendant may have innocently infringed the copyright (*q*). But an innocent infringer will not necessarily be ordered to pay costs (*r*). If the defendant do not, after injunction obtained, offer to pay the costs, and to give the plaintiff all the other relief to which he is entitled, the plaintiff may bring the suit to a hearing, and will be entitled to the costs of the suit, although at the hearing he may waive his right to the other relief (*s*). But if the defendant offers to submit to the injunction with costs, and to give the plaintiff all the relief to which he is entitled, the Court will not give the plaintiff his costs of the subsequent prosecution of the suit to the hearing (*t*), and may order him to pay the defendant's costs (*u*).

In a case where an action for infringement failed on the ground of the indecency of the work, and the defendant had repeated the indecent passages in his own work, the action was dismissed without costs (*x*).

Limitation of actions.

An action in respect of the infringement of copyright must be brought within three years of the infringement (*y*).

University copyright.

The Copyright Act, 1911, which repeals the Copyright Act, 1775 (15 Geo. 3, c. 53), does not deprive any of the Universities and colleges mentioned in the latter Act of the copyright they already possess under that Act, but their remedies for infringement of any such copyright are under the Copyright Act, 1911, and not under the old Act (*z*).

182; *Wittman* v. *Oppenheim*, 27 C. D. 260, 268; 54 L. J. Ch. 56; see *Burberrys* v. *Watkinson*, *supra*; *Weingarten* v. *Bayer*, (1905) 92 L. T. p. 513; 22 R. P. C. p. 350.

(*q*) *Wittman* v. *Oppenheim*, 27 C. D. 260; 54 L. J. Ch. 56; *Weatherby & Sons* v. *International Horse Agency Co.*, (1910) 2 Ch. p. 305; 79 L. J. Ch. p. 613.

(*r*) *American Tobacco Co.* v. *Guest*, (1892) 1 Ch. 630; 61 L. J. Ch. 242 (trade mark); *Haufstaengl* v. *Smith*, (1905) 1 Ch. 528; 74 L. J. Ch. 304; *Burberrys* v. *Watkinson*, (1906) 23 R. P. C. 141 (passing off).

(*s*) *Ante*, p. 387.

(*t*) Ib.

(*u*) See *Fettes* v. *Williams*, (1908) 25 R. P. C. 511; *Slazenger* v. *Spalding*, (1910) 1 Ch. 261; 79 L. J. Ch. 122.

(*x*) *Baschet* v. *London Illustrated Standard Co.*, (1900) 1 Ch. 73; 69 L. J. Ch. 35.

(*y*) Copyright Act, 1911, s. 10.

(*z*) Ib. s. 33.

Sect. 4.—International Copyright.

Power to extend Copyright Act, 1911, to foreign works.

By Part II. of the Copyright Act, 1911, Orders in Council may be made directing that the Act (except such parts, if any, as may be specified in the Order) shall apply—

(1) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of the King's dominions to which the Act extends; (2) to literary, dramatic, musical, and artistic works, the authors of which were at the time of the making of the work subjects or citizens of the foreign country to which the Order relates, in like manner as if they were British subjects; (3) in respect of residence in a foreign country to which the Order relates, in like manner as if the residence were residence in the parts of the dominions to which the Act extends (*a*).

The Order may provide (*inter alia*) that the term of copyright within the parts of the King's dominions to which the Act extends shall not exceed that conferred by the law of the country to which the Order relates (*b*), that the enjoyment of the rights conferred by the Act shall be subject to the accomplishment of such conditions and formalities (if any) as may be prescribed by the Order (*c*), and that in applying the provisions of the Act as to ownership of copyright, and as to existing works, the Order may make such modifications as appear necessary (*d*).

Foreign country not protecting British works.

If a foreign country does not give, or has not undertaken to give, adequate protection to the works of British authors, an Order may direct that such of the provisions of the Act as confer copyright in works first published within the parts of the King's dominions to which the Act extends, shall not apply to works published after the date specified in the Order,

(*a*) Sect. 29, sub-s. 1 (a), (b), (c); Sect. 30, sub-ss. 1, 2, of the Act provides that Part II. shall apply to British possessions, except self-governing dominions, and that the Governors in Council of self-governing dominions may make like orders.

(*b*) Sect. 29, sub-s. 1 (ii.).

(*c*) Ib. (iv.)

(*d*) Ib. (v.), (vi.).

the authors of which are subjects or citizens of such foreign country, and are not resident in the King's dominions (*e*).

Remedies.

An English author seeking to prevent infringements of his copyright in foreign countries, must apply to the foreign and not to the English Courts (*f*).

An author suing in England to prevent infringement of his foreign copyright, must show that he is entitled to protection in the country of origin of his work (*g*).

Sect. 5.—Copyright in Designs.

Sect. 5.

The Copyright Act, 1911, does not apply to designs capable of being registered under the Patents and Designs Act, 1907 (*h*), except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process (*i*).

Duration of copyright.

When a design is registered, the registered proprietor of the design has, subject to the provisions of the Act, copyright in the design during five years from the date of registration. This term can be extended for a further period of five years, and may be extended by the Comptroller for a third period of five years (*k*).

Design, meaning of.

"Design" for the purposes of the Patents and Designs Act, 1907, means any design (not being a design for a sculpture or other thing within the protection of the Sculpture Copyright Act, 1814 (*l*)), applicable to any article of manufacture and any substance, artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the

(*e*) Sect. 23; and see sect. 29, sub-s. 1 (i.)

(*f*) *Morocco Bound* v. *Harris*, (1895) 1 Ch. 535; 64 L. J. Ch. 400.

(*g*) *Baschet* v. *London Illustrated Standard Co.*, (1900) 1 Ch. 73; 69 L. J. Ch. 35.

(*h*) 7 Edw. 7, c. 29, Part II.

(*i*) Copyright Act, 1911, s. 22, sub-s. 1; and see the Designs Rules, 1912, St. R. & O. 1912, No. 661.

(*k*) 7 Edw. 7, c. 29, s. 53; and see Designs Rules, 1908, rr. 37—42, as to extension and payment of fees.

(*l*) 54 Geo. 3, c. 56. This Act is repealed by the Copyright Act, 1911, s. 36. See Sched. II.

ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined (*m*).

Copyright.

Copyright means the exclusive right to apply a design to any such article in any class in which the design is registered (*n*).

Registration.

The proprietor of any new and original design (*o*), not previously published in the United Kingdom, may have his design registered (*p*), and is on registration entitled to have a certificate of registration (*q*).

A design to be registered must be new or original.

A design to be registrable under the Act, must be some conception or suggestion as to shape, configuration, pattern or ornament, and not a conception or suggestion as to a mode or principle of construction of an article (*r*). A design must also be substantially new "or" substantially original, having regard to the nature of the subject to which it is to be applied. A design is not a proper subject for registration unless there is a clearly marked and defined difference involving substantial novelty between that which is to be registered as a new design and that which has gone before. However useless a design may be, it is within the meaning of the Act if it is novel and original (*s*). The words "new *or* original" in the section (*t*), involve the idea of novelty

(*m*) 7 Edw. 7, c. 29, s. 93.

(*n*) Ib. As to classification of goods, see Designs Rules, 1908, r. 6, and Sched. III.

(*o*) As to who is the proprietor, see 7 Edw. 7, c. 29, s. 93.

(*p*) Ib. ss. 49, 52. As to cancellation of the registration of designs used wholly or mainly abroad, see sect. 58, and Designs Rules, 1908, rr. 70—75.

(*q*) Ib. s. 51.

(*r*) *Re Bayer's Design*, (1906) 24 R. P. C. 65; affirmed on appeal, 25 R. P. C. 56; *Pugh* v. *Riley Cycle Co.*, (1912) 1 Ch. pp. 619, 620; 81 L. J. Ch. p. 479.

(*s*) *Le May* v. *Welch*, 28 C. D. 24; 54 L. J. Ch. 279; *Hecla Foundry Co.* v. *Walker*, 14 A. C. pp. 556, 557; 59 L. J. P. C. 46 (Sc.); *Re Morton's Design*, 17 R. P. C. p. 121; *Hutchison & Co.* v. *St. Mungo Co.*, (1907) 24 R. P. C. 264, 271 (Sc.); *Gramophone Co.* v. *Magazine Holder Co.*, (1911) 104 L. T. 259; 28 R. P. C. 221.

(*t*) 7 Edw. 7, c. 29, s. 49, sub-s. 1.

either in the pattern, shape, or ornament itself, or in the way in which an old pattern, shape or ornament is to be applied to some special subject matter (*u*). Novelty in the idea of the design itself is not necessary; it is sufficient if there is novelty in the application of the design to some article of manufacture to which it has not been applied before (*x*). The mere combination of old materials in an old manner may be registered, if there be a new design. But to be a new design, the combination of old materials must constitute one design and must not be a mere multiplicity of o' . designs (*y*).

Design must be registered before publication.

No person is entitled to the benefit of the statute unless the design has been registered before publication. If there has been publication of the design in the United Kingdom, it cannot be afterwards registered (*z*). But the registration of a design in one class of goods and its publication in connection with such goods, will not prevent or invalidate its registration in some other class of goods (*a*).

Effect of disclosure.

Nor is disclosure of a design by the proprietor to another person in such circumstances as would make it contrary to good faith for the other person to use or publish it, or the disclosure of a design in breach of good faith by a person, or the acceptance of a first and confidential order for goods bearing a new and original textile design intended for registration, a publication of the design sufficient to invalidate the copyright therein if registration is subsequently obtained (*b*).

Nor will the exhibition of a design at an industrial or international exhibition certified as such by the Board of

(*u*) *Dover* v. *Nürnberger Celluloidwaren Fabrik*, (1910) 2 Ch. p. 29; 79 L. J. Ch. p. 628.

(*x*) *Saunders* v. *Wiel*, (1893) 1 Q. B. 470; 62 L. J. Q. B. 341; *Re Clarke's Design*, (1896) 2 Ch. p. 45; 65 L. J. Ch. 629; *Dover & Co.* v. *Nürnberger Celluloidwaren Fabrik*, (1910) 2 Ch. 25; 79 L. J. Ch. 625.

(*y*) *Holdsworth* v. *M'Crea*, L. R. 2 H. L. 380; 36 L. J. Q. B. 297; *Lazarus* v. *Charles*, 16 Eq. 117; 42 L. J. Ch. 507; *Rivett* v. *Grimshaw*, 11 R. P. C. 351.

(*z*) 7 Edw. 7, c. 29, s. 49; *British Insulated Cable Co.* v. *London Electrical Wire Co.*, (1913) 30 R. P. C. 621.

(*a*) 7 Edw. 7, c. 29, s. 50.

(*b*) Ib. s. 55; *British Insulated Cable Co.* v. *London Electrical Wire Co.*, *supra*.

Trade prevent or invalidate registration, provided certain ditions required by the Act are complied with (*c*).

Patent and design may in certain cases co-exist.

In most cases it is difficult for a patent right in an ar and the right to a design for the same article to co-e for if a patent is granted first and the patented artie published to the world, a design of the article could afterwards be held to be novel so as to be registered. the two rights may in certain circumstances co-exist Thus, where a person applied for a patent, and registe design between the date of his provisional specification v contained no drawings, and the date of his complete sp cation with a drawing identical with his registered de and subsequently the patent was granted bearing the of his application, it was held that the validity of the r tration of the design was not affected by the grant o patent of earlier date (*e*).

Marking.

Before delivery on sale of any articles to which a regis desig. has been applied, the proprietor of the design eause each article to be marked with the prescribed mar with the prescribed words, or figures denoting that the d is registered; and if he fails to do so, he will not be en to recover any penalty or damages in respect of any infr ment of his copyright in the design, unless he shows he took all proper steps to ensure the marking of the ar or unless he shows that the infringement took place the infringer knew or had received notice of the exis of the copyright in the design (*f*).

But the proprietor is not deprived of protection be he places on the articles, besides the registered nu other numbers which ought not to be there (*g*).

(*c*) 7 Edw. 7, c. 29, s. 59; and see Designs Rules, 1908, r. 76.

(*d*) *Walker & Co.* v. *Falkirk Iron Co.*, 4 R. P. C. 390; *Werner Motors Co.* v. *Gamage & Co.*, (1904) 2 Ch. p. 588; 73 L. J. Ch. 770.

(*e*) *Werner Motors Co.* v. *Gamage & Co.*, *supra*.

(*f*) 7 Edw. 7, c. 29, s. 54, sub-s. 1 (b); and see Designs 1908, r. 68. See *Wittma Oppenheim*, 27 C. D. 260; 54 L 56. As to the power of the of Trade to modify or dispen the requirements of the Ac marking, see sect. 54, sub-s

(*g*) *Harper* v. *Wright*, (1 Ch. 142; 65 L. J. Ch. 161.

Piracy of registered design.

By sect. 60, sub-sect. 1, clause (a), of the Patents and Designs Act, 1907, it is provided, that during the existence of copyright in any design, no person may for the purposes of sale apply or cause to be applied to any article in any class of goods in which the design is registered, the design or any fraudulent or obvious imitation thereof, except with the licence or written consent of the registered proprietor, or do anything with a view to enable the design to be so applied (*h*); or, (clause (b)), knowing that the design or any fraudulent or obvious imitation thereof has been applied to an article without the consent of the registered proprietor, publish or expose or cause to be published or exposed for sale the article.

Clause (a) deals with the manufacturer or producer of goods, and clause (b) with the retail seller (*i*). Under clause (a) it is not necessary as under clause (b) for the proprietor of a registered design to prove that the infringer knew of the registration of the design (*k*). It is an offence within sect. 60 (1) (a) to do anything in the United Kingdom with a view to enable the design to be applied in the manner described in clause (a) without the consent of the registered proprietor, although the application of the design is only to take place out of the United Kingdom (*l*).

Remedies of registered proprietor.

The registered proprietor of a design may either bring an action for the recovery of damages and an injunction for acts in contravention of the section, "or" he may recover for every contravention a sum not exceeding fifty pounds as a simple contract debt (*m*).

Who may sue for infringement.

The right of action is given to the registered proprietor (*n*) exclusively. A person, therefore, who has merely a licence

(*h*) See, as to the sub-section, *Haddon* v. *Bannerman*, (1912) 2 Ch. 607; 81 L. J. Ch. 766.

(*i*) *Boustead* v. *Dempster*, (1908) 25 R. P. C. p. 124 (Sc.).

(*k*) Ib.; see sect. 54, sub.-s. 1 (b), *ante*, note (*f*).

(*l*) *Haddon* v. *Bannerman*, (1912) 2 Ch. 607; 81 L. J. Ch. 766.

(*m*) 7 Edw. 7, c. 29, s. 60, sub-s. 2; *Saunders* v. *Wiel*, 9 R. P. C. 459. Damages and penalties cannot both be claimed. The total sum recoverable as a simple contract debt is limited by the sub-section to £100.

(*n*) The registered proprietor may be (i.) the person for whom a

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to sell articles according to the design, cannot sue for infringement (*o*).

Infringement.

The statute protects the registered design as a whole, it is not therefore an infringement to copy part of a design so long as the resulting design is not substantially identical with the registered design (*p*).

In considering whether an article is a copy or a fraudulent or obvious imitation of a registered design, the eye alone is the judge of the identity of the two things (*q*).

Discovery.

When the plaintiff is suing for damages for the infringement of his registered design, he is entitled to interrogate the defendant as to the acts of infringement (*r*), but not when he is proceeding for penalties under sect. 60, sub-sect. 2, of the Act (*s*).

Injunction.

When an interlocutory injunction is applied for, the Court considers the balance of convenience and inconvenience of the parties (*t*) in deciding whether to grant an injunction or not; where there is a considerable doubt as to the plaintiff's rights (*u*), or he has been guilty of delay (*x*), the application will generally be ordered to stand to the hearing, the defendant being ordered to keep an account.

design is made for good consideration, (ii.) the person who acquires a design or the right to "apply" the design, to an article (iii.) in any other case the author of the design; and (iv.) the person in whom the property in or right to apply the design has devolved from the original proprietor. See sects. 60, 71, 93.

(*o*) *Woolley* v. *Broad*, (1892) 1 Q. B. 806; 61 L. J. Q. B. 259.

(*p*) *Sackett* v. *Clozenberg*, (1910) 27 R. P. C. 105; *Gramophone Co.* v. *Magazine Holder Co.*, (1911) 104 L. T. 259; 28 R. P. C. 221; see sect. 60, *ante*, note (*h*).

(*q*) *Holdsworth* v. *M'Crea*, L. R. 2 H. L., p. 388; *Hecla Foundry Co.* v. *Walker*; 14 A. C. p. 557; 6 R. P. C. p. 560; *Re Bayer's Design*, (1907) 24 R. P. C. p. 77; *Leatherlee Co.* v. *Lycett Saddle Co.*, (1909) 26 R. P. C. p. 171; *Dover Co.* v. *Nürnberger Celluloidwaren Fabrik*, (1910) 2 Ch. p. 35; 79 L. J. Ch. p. 631; *Pugh* v. *Riley Cycle Co.*, (1912) 1 Ch. p. 624; 81 L. J. Ch. p. 479.

(*r*) See R. S. C. Order XXXI.

(*s*) *Saunders* v. *Wiel*, (1892) 2 Q. B. 321; 62 L. J. Q. B. 337; *Titus Astle Ltd.* v. *Mansfield*, (1905) 22 R. P. C. 356 (where an injunction also was claimed).

(*t*) *Grafton* v. *Watson*, 51 L. T. 141; *Hildesheimer* v. *Dann*, 64 L. T. 452—456; *ante*, pp. 25—28.

(*u*) *Mitchell* v. *Henry*, 15 C. D. p. 195.

(*x*) *Baily* v. *Taylor*, 1 R. & M., p. 76; 3 L. J. Ch. 66; 32 R. R. 146; and see *ante*, pp. 24, 25.

Delivery up.

Where the plaintiff establishes at the trial that his registered design has been infringed, he is *primâ facie* entitled to an injunction (*y*); he is also entitled to an order for delivery up of the infringing articles (*z*). But where the defendant has undertaken not to repeat the wrongful acts, and there is no ground for apprehending that he will commit any further infringements, it is not the practice of the Court to grant an injunction (*a*).

Costs.

The costs of an action for the infringement of a registered design follow the event, subject however to the discretion of the Court as in other actions (*b*). Where a plaintiff has obtained a certificate of the validity of the copyright in his design, in any subsequent action for infringement in which he obtains judgment he will be entitled to his full costs, charges and expenses as between solicitor and client, unless the Court otherwise directs (*c*).

(*y*) *Proctor* v. *Bayley*, 42 C. D. p. 398 (patent); *Werner Motors Co.* v. *Gamage & Co.*, (1904) 1 Ch. pp. 267, 268.

(*z*) *Ingram* v. *Edwards*, (1904) 21 R. P. C. p. 467; *M'Crae* v. *Holdsworth*, 2 De G. & Sm. p. 500.

(*a*) *Proctor* v. *Bayley*, 42 C. D. p. 401; *Werner Motors Co.* v. *Gamage & Co.*, (1904) 1 Ch. pp. 267, 268.

(*b*) See *ante*, pp. 386, 387.

(*c*) 7 Edw. 7, c. 29, ss. 35, 61.

CHAPTER X.

INJUNCTIONS TO RESTRAIN THE BREACH OF CONTRACT.

SECT. 1.—INJUNCTIONS AGAINST BREACH OF COVENANT OR AGREEMENT.

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Jurisdiction.

THE jurisdiction of the Court by interlocutory injunction against breach of covenant or agreement is in aid of the legal right. The jurisdiction is exercised either by way of injunction or by way of specific performance. The consideration and principles upon which the Court acts in restraining by injunction breaches of covenant differ in a material respect from those upon which it acts in decreeing specific performance. It is not the practice of the Court to decree specific performance of part of an agreement, where there are other parts which it cannot carry out. Unless the whole agreement can be specifically enforced, and complete justice be done between the parties, the Court will, as a general rule, decline to interfere (*a*). The Court will not interpose partially, except in cases in which the parts of the agreement, which cannot be specifically enforced, are independent of those which may be specifically performed (*b*), or are subordinate provisions (*c*).

(*a*) *Gervais* v. *Edwards*, 2 Dr. & War. 80; 59 R. R. 647; *South Wales Co.* v. *Wythes*, 5 De G. M. & G. 880; 24 L. J. Ch. 87; 104 R. R. 327; *Phipps* v. *Jackson*, 56 L. J. Ch. 550; *Merchants' Trading Co.* v. *Banner*, 12 Eq. p. 23; 40 L. J. Ch. 515. But see *Jones* v. *Tankerville* (*Earl*), (1909) 2 Ch. 443, 444; 78 L. J. Ch. 674.

(*b*) *Gibson* v. *Goldsmid*, 5 De G. M. & G. 757; 24 L. J. Ch. 279; 104 R. R. 265; *Ogden* v. *Fossick*, 4 De G. F. & J. 426; 32 L. J. Ch. 73; *Frith* v. *Frith*, (1906) A. C. p. 261; 75 L. J. P. C. 50. See *Measures Bros.* v. *Measures*, (1910) 2 Ch. p. 262; 79 L. J. Ch. 707, as to stipulations in contracts being construed as dependent and interdependent.

(*c*) *Blackett* v. *Bates*, 2 H. & M. 270; 34 L. J. Ch. 515.

Injunction and specific performance.

In all cases where specific performance can be decreed, the jurisdiction by injunction will attach as a matter of course, but it is not confined to such cases, but will be exercised in all cases where it can operate to bind men's consciences to a true and literal performance of their agreements. The Court will not suffer men to depart from their agreements at their pleasure, leaving the party with whom they have contracted to the mere chance of damages which a jury may give (*d*).

Thus, where the plaintiffs had entered into a contract with the defendant for the purchase of certain timber growing on his estate, with the right to enter upon the estate to saw and remove the timber, and the defendant subsequently repudiated the contract and forcibly ousted the plaintiffs from the estate, the Court granted an injunction restraining the defendant from revoking the licence to enter upon the land and preventing the plaintiffs carrying out the contract, although it might not have been able to compel the plaintiffs to cut the timber if they had refused to do so (*e*). Nor will the Court refrain from granting an injunction only because there are other covenants to be performed which may be possibly broken hereafter (*f*).

Principles on which the jurisdiction is exercised.

The jurisdiction of the Court by way of interlocutory injunction against breach of covenant or contract being in aid of the legal right, and having for its object the protection of the property from irreparable damage pending the trial of the right, a man who seeks the aid of the Court must be able to show a good *primâ facie* legal title to the right which he asserts (*g*). If the right at law under the covenant is clear or fairly made out, and the breach of it is clear or

(*d*) *Lumley* v. *Wagner*, 1 De G. M. & G. 619; 21 L. J. Ch. 898; 91 R. R. 193; *De Mattos* v. *Gibson*, 4 De G. & J. 282. See *Moore* v. *Ulleoats Mining Co.*, (1908) 1 Ch. pp. 585, 586; 77 L. J. Ch. 282; *Jones* v. *Tankerville* (*Earl*), (1909) 2 Ch. 440; 78 L. J. Ch. 674.

(*e*) *Jones* v. *Tankerville* (*Earl*), *supra*.

(*f*) *Rigby* v. *Great Western Railway Co.*, 15 L. J. Ch. p. 271; S. C. on appeal 2 Ph. 44; 78 R. R. 12; and see *Waring* v. *Manchester, Sheffield and Lincolnshire Railway Co.*, 7 Hare, 482; 18 L. J. Ch. 450; 82 R. R. 196.

(*g*) *Capes* v. *Hutton*, 2 Russ. 357; 26 R. R. 102; *Sainter* v. *Ferguson*, 1 Mac. & G. p. 289; 19 L. J. Ch. 170, *ante*, pp. 16—20.

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fairly made out, and serious injury is likely to arise from the breach, it is the duty of the Court to interfere before the hearing to restrain the breach. But if the right at law under the covenant is not clear, or is not fairly made out, or the breach of it is doubtful and no serious injury can arise to the plaintiff, pending the trial of the right, the case resolves itself into a question of comparative injury, whether the defendant will be more damnified by the injunction being granted or the plaintiff by its being withheld (*h*).

Threatened breach of covenant.

It is not necessary that the breach in respect of which the interference of the Court is sought should have been actually committed: it is enough that the defendant claims and insists on his right to do the act complained of, although he may not have actually done it (*i*). But the Court will not interfere unless it is clear that a breach is intended. The Court will not assume that a man means to violate his agreement (*k*).

The circumstance that a lessor has the right of re-entry for breach of a covenant does not preclude him from coming to the Court to restrain the breach (*l*).

In what cases injunction will be refused.

But to warrant the interference of the Court, it is not enough that the right at law under the covenant or contract be clear and the breach be clear. It is in all cases necessary that the covenant or contract should be of such a nature that it can consistently with the rules and principles of the Court be enforced. If the covenant or contract is from its nature such that the Court cannot enforce specifically its performance, or if, from the nature of the act to be done or refrained from, the remedy lies peculiarly at law, and a full and adequate compensation can be had there, the Court will not interfere (*m*). In a case in which A., as agent for B.

(*h*) *Wilkinson* v. *Rogers*, 2 De G. J. & S. 62, 69; *Garrett* v. *Banstead and Epsom Railway Co.*, 4 De G. J. & S. 467; *ante*, pp. 25—28.

(*i*) *Tipping* v. *Eckersley*, 2 K. & J. 264; 110 R. R. 216; *ante*, pp. 17, 18.

(*k*) *Foster* v. *Birmingham, Wolverhampton, &c., Railway Co.*, 2 W. R. 378. *Worsley* v. *Swan*, 51 L. J. Ch. 576. See *Pattison* v. *Gilford*, 18 Eq. 259; 43 L. J. Ch. 524.

(*l*) *Parker* v. *Whyte*, 1 H. & M. 167; 32 L. J. Ch. 520.

(*m*) *Collins* v. *Plumb*, 16 Ves. 454; 10 R. R. 214; *Holmes* v.

and C. (C. being an infant), agreed to grant a lease to D., and D. brought an action for specific performance and claimed an injunction to restrain B. and C. until the trial from granting a lease to anyone else, it was held that as specific performance could not be granted in respect of the entirety it ought not to be granted in respect of the share of the adult defendant alone, and that accordingly an injunction should not issue against either defendant (*n*).

Contracts of loan.

The Court will not decree specific performance of a contract for a loan, whether the loan is to be on security or not (*o*); but specific performance will be decreed of a contract to subscribe for debentures in a company (*p*). Nor will the Court generally entertain jurisdiction in respect of contracts for building or other work (*q*). But this rule is not without exceptions. Where, for instance, a railway company has taken lands from a landowner on the terms that they will carry out certain works, the Court will compel them to carry out such works (*r*). A plaintiff in order to bring himself within the exception must establish (1) that the building work of which he seeks to enforce performance is clearly defined by the contract, (2) that the plaintiff has a substantial interest in having the contract performed which

Contracts for building or other work.

Eastern Counties Railway Co., 3 K. & J. 675; 112 R. R. 339; *Munro* v. *Wivenhoe, &c., Railway Co.*, 4 De G. J. & S. p. 733; 13 W. R. 880; *Catt* v. *Tourle*, 4 Ch. pp. 657, 658; 38 L. J. Ch. 665; and see *Frith* v. *Frith*, (1906) A. C. 254, 261; 75 L. J. P. C. 50. Cf. *Jones* v. *Tankerville (Earl)*, (1909) 2 Ch. 440; 78 L. J. Ch. 74.

(*n*) *Lumley* v. *Ravenscroft*, (1895) 1 Q. B. 683; 64 L. J. Q. B. 441.

(*o*) *Rogers* v. *Challis*, 27 Beav. 175; 29 L. J. Ch. 240; *Western Waggon Co.* v. *West*, (1892) 1 Ch. p. 275; 61 L. J. Ch. 244; *South African Territories Co.* v. *Wallington*, (1898) A. C. 309; 67 L. J. Q. B. 470. See *Starkey* v. *Barton*, (1909) 1 Ch. p. 290; 78 L. J. Ch. 129.

(*p*) Companies (Consolidation) Act, 1908, s. 105, re-enacting sect. 16 of the Companies Act, 1907.

(*q*) *South Wales Railway Co.* v. *Wythes*, 1 K. & J. 186; 5 De G. M. & G. 880; 103 R. R. 56; *Garrett* v. *Banstead, &c., Railway Co.*, 4 De G. J. & S. 462; 13 W. R. 878; *Wolverhampton Corporation* v. *Emmons*, (1901) 1 K. B. 515; 70 L. J. K. B. 429; *Att.-Gen.* v. *Staffordshire County Council*, (1905) 1 Ch. p. 342; 74 L. J. Ch. p. 155; *Rushbrooke* v. *O'Sullivan*, (1908) 1 Ir. 232.

(*r*) *Fortescue* v. *Lostwithiel and Fowey Railway Co.*, (1894) 3 Ch. pp. 639, 640; 64 L. J. Ch. 37.

cannot be adequately compensated for by damages, and (*semble*) (3) that the defendant has by the contract obtained possession of the land on which the buildings are to be erected (*s*).

Contracts for personal services.

Nor will the Court entertain jurisdiction in the case of covenants or agreements for personal services (*t*), or involving duties of a personal and confidential character (*u*), or involving supervision which the Court could not undertake (*x*). Nor will the Court enforce a covenant which is vague, indefinite, or uncertain in its terms (*y*), or which is against public policy as being likely to provoke a breach of the peace (*z*).

Uncertainty, illegality of covenants.

Conduct of the party who makes the application will be taken into consideration.

The conduct of the party who seeks the aid of the Court will be taken into consideration upon the application for an injunction. A man who comes to the Court to restrain the breach of a covenant or contract must be able to show that he comes with clean hands (*a*). He cannot invoke the aid of the

(*s*) *Wolverhampton Corporation* v. *Emmons*, (1901) 1 Q. B. p. 525; 70 L. J. K. B. 429; *Molyneux* v. *Richards*, (1906) 1 Ch. pp. 40, 43; 75 L. J. Ch. 39; *Rushbrooke* v. *O'Sullivan*, (1908) I Ir. 232.

(*t*) *Johnson* v. *Shrewsbury and Birmingham Railway Co.*, 3 De G. M. & G. 914; 22 L. J. Ch. 921; *Whitwood Chemical Co.* v. *Hardman*, (1891) 2 Ch. p. 421; 60 L. J. Ch. 428; *Davis* v. *Forman*, (1894) 3 Ch. 654; 64 L. J. Ch. 187; *Frith* v. *Frith*, (1906) A. C. 254; 65 L. J. P. C. 50; *Kirchner* v. *Gruban*, (1909) 1 Ch. p. 421; 78 L. J. Ch. 117.

(*u*) *Pickering* v. *Bishop of Ely*, 2 Y. & C. C. C. 249; 12 L. J. Ch. 271; 60 R. R. 132.

(*x*) *Powell Duffryn Steam Coal Co.* v. *Taff Vale Railway Co.*, 9 Ch. 331; 43 L. J. Ch. 575; *Ryan* v. *Mutual, Tontine, &c., Co.*, (1893) 1 Ch. 116; 62 L. J. Ch. 252; *Keith, Prowse & Co.* v. *National Telephone Co.*, (1894) 2 Ch. p. 153; 63 L. J. Ch. 373. See *Wolverhampton Corporation* v. *Emmons*, (1901) 1 Q. B p. 523; 70 L. J. K. B. 429; *Phipps* v. *Jackson*, 56 L. J. Ch. 550; *Rushbrooke* v. *O'Sullivan*, (1908) 1 Ir. 232; *Dominion Coal Co.* v. *Dominion Iron Co.*, (1909) A. C. 293; 78 L. J. P. C. 115.

(*y*) *Kemble* v. *Keen*, 6 Sim. 333; 38 R. R. 125; *Mann* v. *Stephens*, 15 Sim. 379; 74 R. R. 101; *Low* v. *Innes*, 4 De G. J. & S. 288; *Davies* v. *Davies*, 36 C. D. 359; 56 L. J. Ch. 962; *Murray* v. *Dunn*, (1907) A. C. 283; 97 L T. 112; *Douglas* v. *Baynes*, (1908) A. C. 477, 485; 78 L. J. P. C. 13. Cf. *Sanderson* v. *Cockermouth Railway Co.*, 11 Beav. 497; 19 L. J. Ch. 503; 83 R. R. 237; see *Waring and Gillow* v. *Thompson*, (1913) 29 T. L. R. 154.

(*z*) *Woodward* v. *Battersea Corporation*, (1911) 104 L. T. 51; 27 T. L. R. 196 (anti-vivisection inscription).

(*a*) *Stiff* v. *Cassell*, 2 Jur. N. S. 348; 106 R. R. 943; *Maythorne* v.

Court, if the covenant which he seeks the aid of the Court to enforce is in any way tainted with illegality (*b*). Nor can he have relief, unless it appear that he has actually carried out, as far as in him lies, his own part of the agreement (*c*), and unless he can show that he has used due diligence in making the application.

Delay, acquiescence, waiver.

Delay or acquiescence may disentitle a plaintiff to relief (*d*). If a covenantee suffer the long and continuous (*e.g.*, twenty-four years) user of the property by the covenantor in a manner wholly inconsistent with the tenor and purpose of a restrictive covenant subject to which the property was conveyed, this is tantamount to a waiver and release of such covenant (*e*). A covenantee who seeing a covenantor spend monies upon property in doing acts which are inconsistent with the terms of the covenant, but upon the faith that no obstacle will be afterwards thrown in the way of his enjoyment, stands by and makes no objection while the monies are being expended (*f*), or whose own acts have been inconsistent with the covenant, or who has acquiesced in the doing of acts which are inconsistent with it, cannot come to a Court of equity to have the covenant or contract enforced (*g*).

Palmer, 11 Jur. N. S. 230; *ante*, p. 20.

(*b*) *Davies* v. *Makuna*, 29 C. D. 596; 54 L. J. Ch. 1148; *Woodward* v. *Battersea Corporation*, (1911) 104 L. T. 51; 27 T. L. R. 196.

(*c*) *De Mattos* v. *Gibson*, 4 De G. & J. 276; 28 L. J. Ch. 498; *Peto* v. *Brighton, Uckfield and Tonbridge Railway Co.*, 1 H. & M. 468; *Fechter* v. *Montgomery*, 33 Beav. 22; *Telegraph Despatch Co.* v. *M'Lean*, 8 Ch. 658; *Measures Brothers* v. *Measures*, (1910) 2 Ch. 254, 259; 79 L. J. Ch. 707.

(*d*) *Pollard* v. *Clayton*, 1 K. & J. 462; 103 R. R. 187; *Maythorne* v. *Palmer*, 11 Jur. N. S. 230; *Gaskin* v. *Balls*, 13 C. D. 324; 28 W. R. 552; *Knight* v. *Simmons*, (1896) 2 Ch. 297; 65 L. J. Ch. 583.

(*e*) *Gibson* v. *Doeg*, 2 H. & N. 615; 27 L. J. Ex. 37; *Hepworth* v. *Pickles*, (1900) 1 Ch. 108; 69 L. J. Ch. 55; *Worcester College* v. *Oxford Canal Navigation*, (1912) 81 L. J. Ch. 1; 105 L. T. 501.

(*f*) *Johnstone* v. *Hall*, 2 K. & J. 424; 25 L. J. Ch. 466; 110 R. R. 296; *Eastwood* v. *Lever*, 4 De G. J. & S. 114; 33 L. J. Ch. 335; *Gaskin* v. *Balls*, 13 C. D. 324; 28 W. R. 552; *ante*, pp. 21, 22.

(*g*) *Child* v. *Douglas*, 5 De G. M. & G. 739; 104 R. R. 262; *Whitehead* v. *Bennett*, 9 W. R. 626; *Sayers* v. *Collyer*, 28 C. D. 103; 54 L. J. Ch. 1; *Kelsey* v. *Dodd*, 52 L. J. Ch. 34; *Craig* v. *Greer*, (1889) 1 Ir. 258; *Osborne* v. *Bradley*, (1903) 2 Ch. 451—456; 73 L. J. Ch. 49.

Thus, where the leases of an estate contained covenants by the lessees which were intended to be for the general benefit of them all: *e.g.*, a covenant to build on a uniform plan, and the landlord released some of his tenants from the obligations of the covenants, the Court would not interfere to prevent a similar infringement by others of the tenants (*h*).

Building schemes.

Nor will the Court specifically enforce against a covenantor restrictive covenants entered into under a building scheme for the benefit of an estate, when either by permission or acquiescence, the property has been either entirely or so substantially changed, that the whole character of the neighbourhood has been altered, so that the object for which the covenant was originally entered into must be considered to be at an end (*i*).

Acquiescence and waiver.

Nor will relief be given where there has been for a considerable time a violation of the agreement in respect of which relief is sought both by defendant and plaintiff (*k*). But the case is different if the covenant, though entered into by the landlord with all his tenants, is only a covenant for the benefit of each tenant, and not one for the benefit of all the other tenants (*l*), or if it is left to the landlord himself to determine what tenants shall be released from the obligations of the covenant (*m*). Nor is the equity of a

(*h*) *Roper* v. *Williams*, T. & R. 18; 23 R. R. 169; *Peek* v. *Matthews*, 3 Eq. 515; 15 W. R. 689.

(*i*) *Duke of Bedford* v. *Trustees of British Museum*, 2 M. & K. 552; 2 L. J. (N. S.) Ch. 129; 39 R. R. 288; *German* v. *Chapman*, 7 C. D. p. 279; 47 L. J. Ch. 250; *Elliston* v. *Reacher*, (1908) 2 Ch. p. 393; 77 L. J. Ch. 617; affirmed on appeal on other grounds, (1908) 2 Ch. 665; 78 L. J. Ch. 617; *Sobey* v. *Sainsbury*, (1913) 2 Ch. 513; *Pulleyne* v. *France*, (1913) 57 S. J. 173. As to building schemes, see *Elliston* v. *Reacher*, *supra*, and *Reid* v. *Bickerstaff*, (1909) 2 Ch. 305; 78 L. J. Ch. 753; *Willé* v. *St. John*, (1910) 1 Ch. 88, 326; 79 L. J. Ch. 239.

(*k*) *Sheard* v. *Webb*, 2 W. R. 343.

(*l*) *Patching* v. *Dubbins*, Kay, 1; 23 L. J. Ch. 45; 101 R. R. 491.

(*m*) *Scarisbrick* v. *Tunbridge*, 3 Eq. Rep. 243; *Kemp* v. *Sober*, 1 Sim. N. S. 517; 20 L. J. Ch. 602; 89 R. R. 169. As to reservation a vendor of property subject to restrictions of power to make future sales free from restrictions, see *Sidney* v. *Clarkson*, 35 Beav. 118; *Osborne* v. *Bradley*, (1903) 2 Ch. pp. 454, 455 73 L. J. Ch. 49; *Elliston* v. *Reacher*, (1908) 2 Ch. pp. 356, 387; 77 L. J. Ch. 617.

cestui que trust to require the due performance of a covenant necessarily displaced by a breach of duty on the part of the trustees (*n*). Nor will the principle as to acquiescence be carried so far as to hold a man who has permitted one infringement of a covenant bound to permit another (*o*). Nor will a landlord be held to have waived his restrictive covenants over an extensive estate by merely permitting some tenant or other who lives at a distance to do something which was prohibited by his covenant (*p*). Nor will passive acquiescence in a breach of covenant attended with no damage, or at least with trifling damage, preclude a man from complaining of a breach whereby his enjoyment is directly and substantially affected (*q*). Nor will relief be refused merely because in a few instances the covenants have not been enforced (*r*).

Conduct of plaintiff—how far considered.

Nor is it every breach of a covenant upon his part which prevents a man from coming to the Court to have a covenant enforced. There must be some such material and substantial breach as will enable the Court to say that his conduct has been such that it ought not to interfere.

Thus, a husband is not debarred from enforcing a deed of separation and from obtaining an order restraining his wife from commencing an action for restitution of conjugal rights by reason of trifling breaches of covenant on his part (*s*). Nor is a man precluded from obtaining an injunc-

(*n*) *Eastwood* v. *Lever*, 4 De G. J. & S. 114.

(*o*) *Lloyd* v. *London, Chatham and Dover Railway Co.*, 2 De G. J. & S. 568; *Osborne* v. *Bradley*, (1903) 2 Ch. p. 457; 73 L. J. Ch. 49.

(*p*) *German* v. *Chapman*, 7 C. D. 271; 47 L. J. Ch. 250; *Knight* v. *Simmonds*, (1896) 2 Ch. pp. 294, 299; 65 L. J. Ch. 583; *Tubbs* v. *Esser*, (1910) 26 T. L. R. 146.

(*q*) *Western* v. *M'Dermott*, 2 Ch. 72; 36 L. J. Ch. 76; *Richards* v. *Revett*, 7 C. D. 224; 47 L. J. Ch. 472; *Meredith* v. *Wilson*, (1893) 69 L. T. 336; *Knight* v. *Simmonds*, *supra*; *Osborne* v. *Bradley*, (1903) 2 Ch. p. 457; 73 L. J. Ch. 49; *White* v. *Pollard*, (1908) 52 S. J. 748; *Tubbs* v. *Esser*, *supra*.

(*r*) *Meredith* v. *Wilson*, *supra*; *Knight* v. *Simmonds*, (1896) 2 Ch. 294; 65 L. J. Ch. 583; and see *Tubbs* v. *Esser*, note (*p*), *supra*.

(*s*) *Besant* v. *Wood*, 12 C. D. 605; 40 L. T. 445; see *Kennedy* v. *Kennedy*, (1907) P. 53; 76 L. J. P. 34.

tion to restrain a breach of covenant by which his property is materially affected by the fact that he himself may, in building his house, have deviated in a trifling degree from the letter of the covenant (*t*), or by the fact that he himself may have broken another covenant when the covenants are essentially different from each other and the covenant which he has broken is of much slighter importance than the covenant which he seeks to enforce (*u*). Nor will the mere delay of fourteen months by a plaintiff in taking steps to prevent the continuance of a breach of a restrictive covenant amount to such acquiescence as to disentitle him to an injunction (*x*).

Rights of other parties taken into consideration.

The jurisdiction to grant an injunction being discretionary, the Court in exercising it will have regard to the way in which the granting relief will affect the rights of other persons (*y*).

Construction of covenants.

The construction of a covenant or a contract is a pure question of law. There is no equitable construction of a covenant or contract as distinct from its legal construction. To construe is nothing more than to arrive at the meaning of the parties to the instrument (*z*). The intention of the parties is to be collected from the language of the instrument, explained by reference to the circumstances under which it was made (*a*), the nature of the transaction (*b*), and the matters to which it relates (*c*). The words of the instrument are to be interpreted in their ordinary grammatical sense and

(*t*) *Jackson* v. *Winifrith*, 47 L. T. 243.

(*u*) *Western* v. *M'Dermott*, 2 Ch. 72; 36 L. J. Ch. 76; *Chitty* v. *Bray*, 48 L. T. 862; W. N. (1883) 98; *Hooper* v. *Bromet*, (1903) 89 L. T. 37; (1904) 90 L. T. 234.

(*x*) *Northumberland* (*Duke*) v. *Bowman*, 56 L. T. 773.

(*y*) *Hope* v. *Gloucester Corporation*, 1 Jur. N. S. 320; *Maythorne* v. *Palmer*, 11 Jur. N. S. 230; *Tubbs* v. *Esser*, (1910) 26 T. L. R. 146.

(*z*) *Scott* v. *Liverpool Corporation*, 3 De G. & J. p. 360.

(*a*) *Turner* v. *Evans*, 2 E. & B. 512; 22 L. J. Q. B. 412; *Cannon* v. *Villars*, 8 C. D. p. 419; 47 L. J. Ch. 597; *Perls* v. *Saalfeld*, (1892) 2 Ch. 155; 61 L. J. Ch. 409. See *Wills* v. *Adams*, (1909) 25 T. L. R. 85; *Cave* v. *Horsell*, (1912) 3 K. B. 541; 28 T. L. R. 543.

(*b*) *Macintyre* v. *Belcher*, 14 C. B. N. S. p. 663; 32 L. J. C. P. 254.

(*c*) See *Wills* v. *Adams*, (1909) 25 T. L. R. 85; *Cattermoul* v. *Jared*, (1909) 53 S. J. 244.

meaning, unless from the context of the instrument and the intention of the parties to be collected from it they appear to have been used in a different sense, or unless in their strict sense they are incapable of being carried into effect, subject however to this, that the meaning of a particular word may be shown by parol evidence to be different in some particular trade, place, or business from its proper and ordinary signification (*d*).

In construing a contract or a covenant the whole of the instrument is to be taken together, so as, if possible, to give effect to every part (*e*), and so that one of the provisions shall not be repugnant to another (*f*). The recitals may be made use of to explain the operative part (*g*). Where the words in the operative part are clear and unambiguous, they cannot be controlled by the recitals or other parts of the instrument. But if the words of the operative part are of doubtful meaning, the recitals and other parts of the instrument may be used as a test to discover the intention of the parties and to fix the meaning of those words (*h*).

A ract must receive such a construction as will make it law . operative (*k*), reasonable (*l*), and capable of being

(*d*) *Mallan* v. *May*, 13 M. & W. pp. 511, 517; 14 L. J. Ex. 48; 63 R. R. 708; *Taylor* v. *Corporation of St. Helen's*, 6 C. D. p. 270; 46 L. J. Ch. 857.

(*e*) *Sicklemore* v. *Thisselton*, 6 M. & S. 9; 18 R. R. 280; *Rigby* v. *Great Western Railway Co.*, 14 M. & W. 811; 15 L. J. Ex. 60; 69 R. R. 836; *Graveley* v. *Barnard*, 18 Eq. 522; 43 L. J. Ch. 656.

(*f*) *Browning* v. *Wright*, 2 Bos. & P. 13; 5 R. R. 521; *Briggs* v. *Earl of Oxford*, 5 De G. & S. 172; 21 L. J. Ch. 829; 91 R. R. 117.

(*g*) *Payler* v. *Homersham*, 4 M. & S. 423; 16 R. R. 516; *Lampon* v. *Corke*, 5 B. & Ald. 606; 24 R. R. 488; *Crouch* v. *Crouch*, (1912) 1 K. B. p. 380; 81 L. J. K. B. 275.

(*h*) *Walsh* v. *Trevanion*, 15 Q. B. p. 751; 19 L. J. Q. B. 458; 81 R. R. 775; *Leggott* v. *Barrett*, 15 C. D. p. 311; *Dawes* v. *Tredwell*, 18 C. D. pp. 358, 359; 29 W. R. 793; *Ex parte Dawes*, 17 Q. B. D. 286; *Crouch* v. *Crouch*, *supra*.

(*i*) *Sterry* v. *Clifton*, 9 C. B. 110; 19 L. J. C. P. 237; 82 R. R. 319; *Avery* v. *Langford*, Kay, 663; 23 L. J. Ch. 837; 101 R. R. 800.

(*k*) *Broom* v. *Batchelor*, 1 H. & N. 255; 25 L. J. Ex. 299; 108 R. R. 555; *Oriental Steamship Co.* v. *Tyler*, (1893) 2 Q. B. p. 527; 63 L. J. Q. B. 128; *Holford* v. *Acton Urban Council*, (1898) 2 Ch. p. 246; 67 L. J. Ch. 636; *Foster and Dicksee* v. *Hastings Corporation*, (1903) 87 L. T. 736; *Sprague* v. *Booth*, (1909) A. C. p. 580; 78 L. J. P. C. p. 165.

(*l*) *Avery* v. *Langford*, Kay, 663;

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carried into effect, if it can be done without doing violence to its terms. But the language of a contract cannot be perverted in order to make it lawful (*m*). Thus, where by an agreement a person was restrained from carrying on any trade within a particular area, the Court refused to give effect to the covenant by construing it as limited to the carrying on of a trade similar to that of the covenantee (*n*). Nor can an unreasonable stipulation be rejected if it was clearly the intention of the parties that it should form part of the contract (*o*).

Construction of covenants restricting user of land.

Covenants by which the user of property is restricted, are construed strictly, and not so as to create a wider obligation than the actual words (*p*). Thus, a covenant by a lessor with his lessee not to let the adjoining (*q*) premises for the purpose of a trade similar to that of the lessee, does not prevent the lessor carrying on the trade in the adjoining premises, or selling such premises to a purchaser carrying on a similar trade (*r*). And a covenant not to erect other than detached or semi-detached houses on land which is described in the particulars of sale as being sold for the erection of private residences, is not broken by the houses being subsequently used other than as private residences (*s*).

Implication of covenants.

Conditions not expressed will not be imported into an agreement, unless there is something in the agreement which shows that the parties must have intended such conditions.

23 L. J. Ch. 837; 101 R. R. 800; *Perls* v. *Saalfeld*, (1892) 2 Ch. 149; 61 L. J. Ch. 409; *Braunstein* v. *Accidental Death Insurance Co.*, 1 B. & S. 782; 31 L. J. Q. B. 17; 124 R. R. 745; *Jones* v. *Gibbons*, 8 Exch. p. 922; 22 L. J. Ex. 347; *Cattermoul* v. *Jared*, (1909) 53 S. J. 244.

(*m*) *Norwich Corporation* v. *Norfolk Railway Co.*, 4 E. & B. 397; 24 L. J. Q. B. 105; *Baker* v. *Hedgcock*, 39 C. D. 520; 57 L. J. Ch. 889; *Perls* v. *Saalfeld*, (1892) 2 Ch. 153, 154; 61 L. J. Ch. 409.

(*n*) *Baker* v. *Hedgcock*, *supra*; see also *Perls* v. *Saalfeld*, *supra*.

(*o*) *Stadhard* v. *Lee*, 3 B. & S. 364; 32 L. J. Q. B. 75.

(*p*) *Kemp* v. *Bird*, 5 C. D. 974; 46 L. J. Ch. 828; *Brigg* v. *Thornton*, (1904) 1 Ch. 386, 395; 73 L. J. Ch. 301.

(*q*) As to meaning of "adjoining," see *Cave* v. *Horsell*, (1912) 3 K. B. 533; 28 T. L. R. 543; *Derby Motor Cab Co.* v. *Crompton*, (1913) 29 T. L. R. 673.

(*r*) *Brigg* v. *Thornton*, (1904) 1 Ch. 395; 73 L. J. Ch. 301.

(*s*) *Wright* v. *Berry*, (1903) 19 T. L. R. 259.

There must be words in the instrument capable of sustaining the meaning which is sought to be implied from them (*t*). If the Court is able to collect from the language of the whole instrument taken together an agreement between the parties that a certain thing shall be done, there is sufficient to enable the Court to say that a covenant is created (*u*). It is not competent for the Court to import a covenant which does not arise by necessary implication from the language of the instrument (*x*). When a man covenants to do a certain thing, it is necessarily implied that he will not wilfully incapacitate himself from doing it (*y*). If he enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to the state of circumstances, under which alone the arrangement can be operative (*z*).

A covenant by a purchaser of land that he will before the commencement of any building, submit plans for the approval of the vendor, involves the negative covenant that no building

(*t*) *Churchward* v. *Reg.*, L. R. 1 Q. B. 195, 211; *Midland Railway Co.* v. *London and North Western Railway Co.*, L. R. 2 Eq. 525; 15 L. T. 264; *Holford* v. *Acton Urban District Council*, (1898) 2 Ch. 240; 67 L. J. Ch. 636.

(*u*) *Rigby* v. *Great Western Railway Co.*, 14 M. & W. p. 815; 15 L. J. Ex. 60; 69 R. R. 836; *James* v. *Cochrane*, 7 Exch. 170, 177; 21 L. J. Ex. 232; 86 R. R. 600; *Great Northern Railway Co.* v. *Harrison*, 12 C. B. 576, 609; 22 L. J. C. P. 49; *Brooks* v. *Jennings*, L. R. 1 C. P. 476; *Hamlyn* v. *Wood*, (1891) 2 Q. B. p. 494; 60 L. J. Q. B. 734; *Douglas* v. *Baynes*, (1908) A. C. p. 482; 78 L. J. P. C. 13.

(*x*) *Kemp* v. *Bird*, 5 C. D. 974; 46 L. J. Ch. 828; *Wright* v. *Berry*, (1903) 19 T. L. R. 259; *Brigg* v. *Thornton*, (1904) 1 Ch. 386, 397; 73 L. J. Ch. 301; *Att.-Gen.* v. *Dublin Steam Packet Co.*, (1909) 25 T. L. R. 697 (H. L.); *Lazarus* v. *Cairn Steamship Co.*, (1912) 106 L. T. 378; 28 T. L. R. 244.

(*y*) *M'Intyre* v. *Belcher*, 14 C. B. N. S. 654; 32 L. J. C. P. 254; *Manchester Ship Canal* v. *Manchester Race Course Co.*, (1901) 2 Ch. 37; 70 L. J. Ch. 468.

(*z*) *Stirling* v. *Maitland*, 5 B. & S. 840; 34 L. J. Q. B. 1; and see *Metropolitan Electric Supply Co.* v. *Ginder*, (1901) 2 Ch. 799; 70 L. J. Ch. 862; *Ogdens* v. *Nelson*, (1904) 2 K. B. 418; 73 L. J. K. B. 865; affirmed on appeal, (1905) A. C. 109; 74 L. J. K. B. 433; *Devonald* v. *Rosser*, (1906) 2 K. B. 728, 732; 75 L. J. K. B. 688; *Att.-Gen.* v. *Dublin Steam Packet Co.*, (1909) 25 T. L. R. 697; *Lazarus* v. *Cairn Steamship Co.*, (1912) 106 L. T. 378; 28 T. L. R. 244,

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shall be commenced until plans have been submitted to and approved by the vendor (*a*).

A covenant by a lessee in a brewer's lease of a tied house not to sell on the demised premises any liquors other than such as shall have been purchased from the lessor imports an implied covenant by the lessor to supply liquors of reasonably good quality and at reasonable prices (*b*).

Implied obligations in contracts.

Implied obligations in a contract are governed by the common intention of the contracting parties. When their common intention has been ascertained, the Court holds them to all that is implied in their common intention. Thus, where a printing company let the upper floors of their premises to a hotel company to be used as additional bedrooms to their hotel, and it was agreed that the printing machinery should continue to be worked on the ground floor, both parties believing that the noise would not interfere with the comfort of the rooms, the Court refused to restrain the working of the machinery although considerable inconvenience was caused to persons using the hotel, there being no evidence that the machinery was being improperly worked (*c*).

Covenants, affirmative or negative.

Covenants are either of an affirmative or negative nature. Where a man covenants that something has been done or shall be done hereafter, the covenant is affirmative. Where a man covenants that a thing has not been done or shall not be done hereafter, the covenant is a negative one. In cases where the covenant is affirmative, the remedy in equity is by way of specific performance. If the covenant is a negative one, the remedy is by way of injunction.

Injunction remedy for breach of negative covenants.

In restraining by injunction the breach of a negative covenant, the interference of the Court is in effect an order for specific performance. "An agreement," said Lord St. Leonards in *Lumley* v. *Wagner* (*d*), "may be as effectually

(*a*) *Powell* v. *Hemsley*, (1909) 1 Ch. 687, 688; 78 L. J. Ch. 337; affirmed on appeal, (1909) 2 Ch. 252; 78 L. J. Ch. 741.

(*b*) *Courage & Co.* v. *Carpenter*, (1910) 1 Ch. 262; 79 L. J. Ch. 184.

(*c*) *Lyttelton Times Co.* v. *Warrens*, (1907) A. C. 476; 76 L. J. P. C. 100.

(*d*) 1 De G. M. & G. p. 615; 21 L. J. Ch. 898; 91 R. R. 193.

performed in this way as by an order for the performance of the thing to be done." "If there is a negative covenant," the Court has no discretion to exercise. If parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of equity has to do is to say by way of injunction that the thing shall not be done. In such a case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience or of the amount of damage or injury, it is the specific performance by the Court of that negative bargain which the parties have made with their eyes open between themselves (*e*), unless the covenantee has by his conduct or omissions, put himself in such an altered relation to the covenantor as to make it manifestly unjust for him to ask the Court to enforce the covenant by injunction (*f*). The usual covenant by an assignee of a lease to perform and observe the covenants and conditions contained in the lease" is not of itself a negative covenant within the strict rule which binds the Court to grant the assignor an injunction where a negative covenant in the lease has been broken by the assignee (*g*).

Covenant by assignee of lease to "perform and observe" covenants of lease.

Persons accordingly who had entered into a covenant not to ring church bells at stated periods and had accepted the benefits of the covenant were restrained from violating its

Injunctions to restrain breach of negative covenants.

(*e*) *Doherty* v. *Allman*, 3 A. C. p. 720. See *McEacharn* v. *Colton*, (1902) A. C. 104, 107; 71 L. J. P. C. 20; *Bickmore* v. *Dimmer*, (1903) 1 Ch. p. 168; 72 L. J. Ch. 96; *Osborne* v. *Bradley*, (1903) 2 Ch. pp. 450, 451; 73 L. J. Ch. 49; *Formby* v. *Barker*, (1903) 2 Ch. p. 554; 72 L. J. Ch. 716; *Harris* v. *Boots Cash Chemist Co.*, (1904) 2 Ch. 383, 384; 73 L. J. Ch. 708; *Elliston* v. *Reacher*, (1908) 2 Ch. p. 395; 77 L. J. Ch. 617, *Att.-Gen.* v. *Walthamstow Urban Council*, (1910) 1 Ch. p. 351; 79 L. J. Ch. p. 269.

(*f*) *Sayers* v. *Collyer*, 28 C. D. p. 108; 54 L. J. Ch. 1; *Craig* v. *Greer*, (1899) 1 Ir. 258; *Osborne* v. *Bradley*, (1903) 2 Ch. p. 451; 73 L. J. Ch. 49. See *Measures Brothers* v. *Measures*, (1910) 2 Ch. 248; 79 L. J. Ch. 707.

(*g*) *Harris* v. *Boots Cash Chemist Co.*, (1904) 2 Ch. 383; 73 L. J. Ch. 708.

obligations (*h*). So also an author who on the sale of a work had covenanted with the purchaser not to publish a work of the like nature, or do anything which might be detrimental to the sale or publication of that work, was restrained from publishing a rival work on the same subject (*i*). So also an agreement between a publisher and an author that the latter should write a tale for the former and should not during the continuance of the agreement write for any other publication, was enforced by injunction, so far as regards the negative part of the stipulation (*k*). So also a man who had covenanted not to perform or write for any other than a particular theatre, was restrained according to the terms of the covenant (*l*). So also a public body (*m*) was restrained from erecting buildings on a plot of land, opposite a club-house, contrary to agreement (*n*). So also the lessee of a mine who had covenanted not to remove machinery from a mine was restrained according to the terms of the covenant (*o*). So also a railway company which had bought land from a man, and had covenanted with him in the purchase deed not to erect any building upon it to a greater height than eighteen feet within the distance of eighty feet from certain other property of his, was restrained according to the terms of the covenant (*p*). So also a railway company was restrained from removing from the railway carriages placards and advertisements of the plaintiff, and from removing from the stations the book-stalls of the plaintiff, contrary to the covenant (*q*). So also the lessee of a coal mine who had covenanted not to remove pillars of coal in working the mine,

(*h*) *Martin* v. *Nutkin*, 2 P. W. 266.

(*i*) *Barfield* v *Nicholson*, 2 Sim. & St. 1; 2 L. J. Ch. 90; 25 R. R. 144; *Ingram* v. *Stiff*, 5 Jur. N. S. 947; 115 R. R. 1033; *Ainsworth* v. *Bentley*, 14 W. R. 630; W. N. (1866) 117.

(*k*) *Stiff* v. *Cassell*, 2 Jur. N. S. 348; 106 R. R. 943.

(*l*) *Morris* v. *Colman*, 18 Ves. 437; 11 R. R. 230.

(*m*) The Commissioners of Woods and Forests.

(*n*) *Rankin* v. *Huskisson*, 4 Sim. 13; 33 R. R. 86.

(*o*) *Hamilton* v. *Dunsford*, 6 Ir. Ch. 412.

(*p*) *Lloyd* v. *London, Chatham and Dover Railway Co.*, 2 De G. J. & S. 568; 34 L. J. Ch. 401.

(*q*) *Holmes* v. *Eastern Counties*

was restrained according to the terms of his covenant (*r*). So also a lessee was restrained from permitting any part of the demised premises to be occupied by tenants carrying on a business which would render an increased premium payable for the insurance of the premises against fire contrary to his covenant (*s*). So also the purchaser of a plot of ground under covenant not to build more than one dwelling-house thereon was restrained from erecting a block of residential flats (*t*) or a building divided into two tenements on different floors without any internal communication, common staircase, or front door. But a covenant not to erect more than a certain number (*u*) of houses on a lot was held not to have been broken by the erection of a building containing a series of flats (*x*). A covenant not to "erect" anything but private dwelling-houses does not prevent the subsequent conversion of such dwelling-houses into shops (*y*), and a covenant by a lessor with his lessee not to let "the adjoining (*z*) premises for a trade similar to that carried on by the lessee," does not prevent the lessor carrying on any trade he choses in the adjoining premises or selling them, and the purchaser carrying on a similar trade therein (*a*). So also a person under covenant to use a house as a "private residence only," will be restrained from using it as a block of flats (*b*), or as a boarding-house for scholars attending a neighbouring school (*c*). So also the lessee of a house who had covenanted not to carry on any business or trade on the demised premises,

Covenants restricting user of property.

Railway Co., 3 K. & J. 675; 112 R. R. 339.

(*r*) *Taylor* v. *Mostyn*, 23 C. D. 584.

(*s*) *Chapman* v. *Mason*, (1910) 103 L. T. 390.

(*t*) *Rogers* v. *Hosegood*, (1900) 2 Ch. 388; 69 L. J. Ch. 652.

(*u*) *Ilford Park Estates Co.* v. *Jacobs*, (1903) 2 Ch. 522; 72 L. J. Ch. 669.

(*x*) *Kimber* v. *Adams*, (1900) 1 Ch. 412; 69 L. J. Ch. 296.

(*y*) *Holford* v. *Acton Urban Council*, (1898) 2 Ch. 240, 248; 67 L. J. Ch. 636; *Reid* v. *Bickerstaff*, (1909) 2 Ch. p. 309; 78 L. J. Ch. 753.

(*z*) As to meaning of "adjoining," see *Ind, Coope & Co.* v. *Hamilton*, (1901) 84 L. T. 168; *Cave* v. *Horsell*, (1912) 3 K. B. 533; 28 T. L. R. 543; *Derby Motor Cab Co.* v. *Crompton*, (1913) 29 T. L. R. 673.

(*a*) *Briggs* v. *Thornton*, (1904) 1 Ch. 386, 395; 73 L. J. Ch. 301.

(*b*) *Rogers* v. *Hosegood*, (1900) 2 Ch. 388; 69 L. J. Ch. 652.

(*c*) *Hobson* v. *Tulloch*, (1898) 1

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was restrained from setting up a school (*d*), from carrying on the trade or business of a baker, confectioner, beershop keeper (*e*), hairdresser (*f*), or auctioneer (*g*), from converting the premises into a hospital and receiving patients who made small payments according to their means (*h*), from setting up a charitable institution where the inmates were received upon payment of a small sum for board and lodging from which no profit was derived (*i*), and from letting the external walls of the demised premises to a bill-posting firm for advertising (*k*). So also a lessee who had covenanted not to make any alteration in the external appearance of the demised premises was restrained from letting part of the walls for bill-posting (*l*), but the erection of a large clock affixed to the external wall of a house was held not to be a breach of a covenant "not to make any alteration to the premises," the covenant being held to be limited to alterations which would affect the form or structure of the building (*m*). So also where a lessee entered into a covenant not "to affix or permit any outward mark or show of business to be affixed" on the demised premises, he was restrained from putting up window blinds and on the railings a plate with his firm's name inscribed thereon (*n*). So also, where

Alteration of premises.

Ch. 424; 67 L. J. Ch. 205. As to meaning of "private dwelling-house" in special Acts, see *Queen Anne Residential Mansions Co.*, (1901) 46 S. J. 70; *M'Nair* v. *Baker*, (1904) 1 K. B. 208; 73 L. J. K. B. 126; *Bristol Guardians* v. *Bristol Waterworks Co.*, (1912) 1 Ch. 846.

(*d*) *Kemp* v. *Sober*, 1 Sim. N. S. 528; 20 L. J. Ch. 602; on appeal, 19 L. T. O. S. 308; 89 R. R. 169; *Johnstone* v. *Hall*, 2 K. & J. p. 423; 25 L. J. Ch. 462; 110 R. R. 296; *Wickenden* v. *Webster*, 6 E. & B. 387; 25 L. J. Q. B. 264; 106 R. R. 638; *German* v. *Chapman*, 7 C. D. 271; 47 L. J. Ch. 250.

(*e*) *Hodson* v. *Coppard*, 29 Beav. 4.

(*f*) *Clements* v. *Welles*, 1 Eq. 200.

(*g*) *Parker* v. *Whyte*, 1 H. & M. 167. See *Moses* v. *Taylor*, 11 W. R. 81. Cf. *Reeves* v. *Cattell*, 24 W. R. 485.

(*h*) *Bramwell* v. *Lacy*, 10 C. D. 691; 48 L. J. Ch. 339.

(*i*) *Rolls* v. *Miller*, 27 C. D. 71; 53 L. J. Ch. 682.

(*k*) *Tubbs* v. *Esser*, (1910) 26 T. L. R. 146.

(*l*) *Heard* v. *Stuart*, (1907) 24 T. L. R. 104.

(*m*) *Bickmore* v. *Dimmer*, (1903) 1 Ch. 158; 72 L. J. Ch. 96. See *Hope Brothers* v. *Cowan*, (1913) 2 Ch. p. 317.

(*n*) *Evans* v. *Davis*, 10 C. D.

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a man had covenanted not to carry on a retail business as a chemist, druggist, and soda water manufacturer, he was restrained from selling single bottles (*o*). So also, where a lessee of a public-house covenanted not to purchase or sell on the demised premises any liquors other than such as should have been purchased of the lessors, he was restrained from purchasing elsewhere, the increased prices demanded by the lessors being at the time reasonable, the injunction being granted so long as the lessors should be ready and willing to supply liquors of reasonable quality and at a reasonable price (*p*).

Covenants against annoyance, offensive trades, nuisance.

So also a lessee who had covenanted not to suffer anything to be done on the premises to the "annoyance" of the lessor or the adjoining occupiers, was restrained from using the premises as a place of public entertainment (*q*).

So also, where a purchaser had covenanted not to erect any building for the carrying on of any "offensive trade," a mandatory injunction was granted for the removal of a large hoarding which he had erected and covered with advertisements (*r*).

A covenant by a purchaser of building land not to do or suffer anything to be done in the premises which should be a "nuisance" to the owners of other lots, is not broken by establishing a national school (*s*), but carrying on a boys'

747; 48 L. J. Ch. 223; see *Att.-Gen.* v. *Playhouse Co.*, (1903) 19 T. L. R. 580.

(*o*) *Treacher* v. *Treacher*, W. N. (1874) 4.

(*p*) *Courage & Co.* v. *Carpenter*, (1910) 1 Ch. 262; 79 L. J. Ch. 184. As to meaning of "fair current market prices" in a covenant by lessee of licensed premises to buy liquors from the lessor, see *Perrett* v. *Radford*, (1901) 17 T. L. R. 301; *Charrington & Co.* v. *Wooder*, W. N. (1913) 369 (H. L.); and as to the burden of a lessee's covenant to purchase beer running with the land, see *Clegg* v. *Hands*, 44 C. D. 503; 59 L. J. Ch. 477; *White* v. *Southend Hotel Co.*, (1897) 1 Ch. 767; 66 L. J. Ch. 387; *Manchester Brewery Co.* v. *Coombs*, (1901) 2 Ch. 608; 70 L. J. Ch. 814.

(*q*) *Collins* v. *Slade*, 23 W. R. 199; (1874) W. N. 205.

(*r*) *Nussey* v. *Provincial Bill Posting Co.*, (1909) 1 Ch. 734; 78 L. J. Ch. 539 (Fletcher Moulton, L.J., diss.).

(*s*) *Harrison* v. *Good*, 11 Eq. 338; 40 L. J. Ch. 294. As to "nuisance," see *Tod-Heatley* v. *Benham*, 40 C. D. p. 92; 58 L. J. Ch. 83; *Adams* v. *Ursell*, (1913) 1 Ch. p. 271; 82 L. J. Ch. p. 158.

school would be a breach of a covenant not to carry on any trade, business or occupation whereby any "injurious or disagreeable noise or nuisance" should be occasioned (*t*).

A covenant against carrying on an "offensive trade" is not broken by keeping a lunatic asylum (*u*), or carrying on the trade of a coachmaker (*x*), or laundryman (*y*), nor is the carrying on of the business of a slaughter-house *per se* a breach of a covenant not to carry on a "noisome or offensive trade or business" (*z*). But carrying on the business of a fried fish shop has been held to be a breach of a covenant against carrying on "an offensive trade" (*a*) and against doing any act which might be an "annoyance or inconvenience to the occupiers of the adjoining property" (*b*). The opening of a house as a public-house is not a breach of a covenant not to carry on a trade or business that might be "offensive or an annoyance, or disturbance" to any of the tenants of the lessor or any part of the neighbourhood (*c*), but the establishment of a hospital is a breach of a covenant against doing any act to the "annoyance, nuisance, grievance, or damage" of the covenantee (*d*), and the erection by a lessee on his premises of a large and substantial trellis screen is a breach of a covenant not to do any act which might be an "annoyance" to the tenants of the lessor (*e*).

Annoyance or inconvenience.

Covenants restraining trades.

A covenant not to use a building as a "public-house for the sale of beer, wine, malt liquor, or spirits," is not broken by the sale of beer by retail under a licence not to be drunk

(*t*) *Wauton* v. *Coppard*, (1899) 1 Ch. 92; 68 L. J. Ch. 8.

(*u*) *Doe* d. *Wetherell* v. *Bird*, 2 A. & E. 161; 4 L. J. K. B. 52. See *Moses* v. *Taylor*, 11 W. R. 81.

(*x*) *Bonnett* v. *Sadler*, 14 Ves. 526; 9 R. R. 341.

(*y*) See *Knight* v. *Simmonds*, (1896) 1 Ch. p. 661; affirmed on appeal on other grounds, (1896) 2 Ch. 294; 65 L. J. Ch. 583.

(*z*) *Cleaver* v. *Bacon*, 4 T. L. R. 27; *Rapley* v. *Smart*, 10 T. L. R. 172; W. N. (1894) 2.

(*a*) *Devonshire* (*Duke*) v. *Brookshaw*, 81 L. T. 83.

(*b*) *Errington* v. *Birt*, (1911) 105 L. T. 373.

(*c*) *Jones* v. *Thorne*, 1 B. & C. 716; 1 L. J. (O. S.) K. B. 200; 25 R. R. 546. See *Gordon* v. *Smart*, 1 Sim. & St. 66; 1 L. J. (O. S.) Ch. 36.

(*d*) *Tod-Heatley* v. *Benham*, 40 C. D. 80, 96; 58 L. J. Ch. 83.

(*e*) *Wood* v. *Cooper*, (1894) 3 Ch. 671; 63 L. J. Ch. 845.

on the premises (*f*). Nor is a covenant not to use a house as a "public-house, tavern or beerhouse" broken by opening a grocer's shop there at which beer is sold to be drunk off the premises as ancillary to the grocer's business (*g*). Nor is a covenant not to use premises as a "public-house or beerhouse" broken by user as a hotel where liquors are supplied only to guests and travellers staying in the house (*h*). But a covenant not to use a house as a "beer-shop" is broken by taking out a licence to sell beer not to be drunk on the premises and selling it there (*i*). A covenant not to use a shop "for the sale of spirituous liquors" is broken by the sale of spirituous liquors in bottle, but is not broken by the sale of wines in bottle (*k*).

A covenant not to use premises as "a coffee-house" is broken by the sale of cups of tea and coffee, and light refreshments to be consumed on the premises (*l*). A covenant not to carry on the business of a fishmonger is not broken by carrying on the business of a fried fish shop (*m*). But a covenant not to use premises otherwise than as "a restaurant" is broken by carrying on the business of a fried fish shop (*n*). A covenant not to carry on or be interested in the business of a "provision merchant" is not broken by the manufacture and sale of margarine (*o*). A covenant not to carry on the business of a wholesale or retail confectioner is not broken by the sale by a grocer and tea dealer of a particular kind of sweetmeat in which a confectioner may happen to deal (*p*). A covenant not to carry on the business of a horse-

(*f*) *Pease* v. *Coats*, 2 Eq. 688; 14 L. T. 886; *London and North Western Railway Co.* v. *Garnett*, 9 Eq. 26; 39 L. J. Ch. 25.

(*g*) *Holt & Co.* v. *Collyer*, 16 C. D. 718; 50 L. J. Ch. 311.

(*h*) *Devonshire* v. *Simmons*, 11 T. L. R. 52.

(*i*) *Bishop of St. Albans* v. *Battersby*, 3 Q. B. D. 359; 47 L. J. Q. B. 571; *London and Suburban Land Co.* v. *Field*, 16 C. D. 645; 50 L. J. Ch. 549.

(*k*) *Fielden* v. *Slater*, 7 Eq. 523; 38 L. J. Ch. 379; *Richardson* v. *Murphy*, (1899) 1 Ir. 248.

(*l*) *Fitz* v. *Iles*, (1893) 1 Ch. 77; 62 L. J. Ch. 258.

(*m*) *Errington* v. *Birt*, (1911) 105 L. T. 373.

(*n*) Ib.

(*o*) *Lovell and Christmas* v. *Wall*, (1911) 104 L. T. 85; 27 T. L. R. 236.

(*p*) *Lumley* v. *Metropolitan Railway Co.*, 34 L. T. 774.

hair manufacturer is not broken by merely dealing in horse-hair (*q*). A covenant not to carry on the business of a ladies outfitter is not broken by carrying on a business of hosiers and drapers and selling some of the articles dealt in by ladies outfitters (*r*). A covenant not to carry on "the business of a draper" or "allow the premises to be used for the sale of or dealing in drapery goods" is not broken by letting the premises to an auctioneer for the sale of fur-lined goods (*s*). A covenant by a lessee to keep licensed premises open in a due and proper course of business as an "inn or licensed victualling house" was held broken by exhibiting notices restricting the sale of refreshments on Sundays, and the amount of liquor to be sold to customers (*t*).

Separation deeds.

Where a man had covenanted in a separation deed not to molest his wife, he was restrained according to the terms of his covenant (*u*). So also an injunction was granted to restrain a wife in accordance with the covenants in a separation deed from molesting her husband and taking any action or other proceeding for the purpose of compelling him to cohabit with her (*z*). So also an injunction was granted to restrain a man in accordance with his covenant from coming within a certain radius of the house of a husband and his wife while they should be residing there (*y*).

Publication of judgment debt.

So also an injunction was granted to restrain the publication of the recovery of a judgment debt against a man contrary to agreement, where the threat to sell the judgment

(*q*) *Harris* v. *Parsons*, 32 Beav. 328.

(*r*) *Stuart* v. *Diplock*, 43 C. D. 343; 59 L. J. Ch. 142.

(*s*) *Wills* v. *Adams*, (1909) 25 T. L. R. 85.

(*t*) *Dartford Brewery Co.* v. *Till*, (1907) 95 L. T. 636; 22 T. L. R. 792.

(*u*) *Sandars* v. *Rodway*, 16 Beav. 211. See *Hunt* v. *Hunt*, 4 De G. F. & J. 221; 31 L. J. Ch. 161; *Marshall* v. *Marshall*, 5 Ex. D. 19; *Clark* v. *Clark*, 10 P. D. 188; 54 L. J. P. 57; *Kennedy* v. *Kennedy*, (1907) P. p. 51; 76 L. J. P. 34. As to what amounts to molestation, see *Fearon* v. *Aylesford*, 14 Q. B. D. 792; 54 L. J. Q. B. 33; *Hunt* v. *Hunt*, (1897) 2 Q. B. 547; 67 L. J. Q. B. 18.

(*x*) *Besant* v. *Wood*, 12 C. D. 605; 48 L. J. Ch. 497.

(*y*) *Upton* v. *Henderson*, (1912) 106 L. T. 839; 28 T. L. R. 398.

debt by auction was not *bonâ fide* but for the purpose of getting better terms (*z*).

Covenants against assignments.

So also the Court will enforce by injunction a covenant in a lease not to assign without the lessor's consent. Such a covenant runs with the land, and is broken even where an assignee of the lease assigns to the original lessee, and an injunction will lie to restrain such assignments (*a*). But a mere licence to use the premises is not a breach of such a covenant (*b*). Where a lessee has covenanted not to assign or underlet without the lessor's consent, such consent not to be unreasonably withheld, the lessee cannot maintain an action for an injunction to restrain the lessor from unreasonably withholding his consent, but can assign or underlet in spite of such refusal (*c*). But the lessee cannot justify the omission to apply for the lessor's consent (*d*).

Covenants restricting user of property construed strictly.

Covenants restricting the letting and user of property are construed strictly, and not so as to create a wider obligation than is imported by the actual words (*e*).

Covenants in restraint of trade.

A class of negative covenants which the Court will enforce by injunction are covenants in partial restraint of trade, where the limitation is reasonable. Covenants in total restraint of trade are absolutely void upon grounds of public policy (*f*). But covenants in partial restraint of trade, that is,

(*z*) *Jameson* v. *Teague*, 3 Jur. N. S. 1206.

(*a*) *McEacharn* v. *Colton*, (1902 A. C. 104; 71 L. J. P. C. 20.

(*b*) *Daly* v. *Edwards*, 83 L. T. 548.

(*c*) *Sear* v. *House Property Society*, 16 C. D. 387; 50 L. J. Ch. 77; *Treloar* v. *Bigge*, L. R. 9 Ex. 151; 43 L. J. Ex. 95. See *Bates* v. *Donaldson*, (1896) 2 Q. B. 241; 65 L. J. Q. B. 578; *Young* v. *Ashley Gardens Properties*, (1903) 2 Ch. 112; 72 L. J. Ch. 520; *Andrew* v. *Bridgman*, (1908) 1 K. B. p. 598; 77 L. J. K. B. 272; *Evans* v. *Levy*, (1910) 1 Ch. p. 457; 79 L. J. Ch. 383; *West* v. *Gwynne*, (1911) 2 Ch. 1; 80 L. J. Ch. 578. As to what is an unreasonable refusal, see *Sheppard* v. *Hong Kong Banking Co.*, (1872) 20 W. R. 459 W. N. 68; *Bates* v. *Donaldson*, *supra*; *Re Spark*, (1905) 1 Ch. 456; 74 L. J. Ch. 318; *Premier Rinks Co.* v. *Amalgamated Cinematograph Co.*, (1912) W. N. 157; 56 S. J. 536. As to the right to assign to a corporation as a "responsible person," see *Willmott* v. *London Road Car Co.*, (1910) 2 Ch. 525; 80 L. J. Ch. 1.

(*d*) *Barrow* v. *Isaacs*, (1891) 1 Q. B. 417; 60 L. J. Q. B. 179; *Eastern Telegraph Co.* v. *Dent*, (1899) 1 Q. B. 835; 68 L. J. Q. B. 564; *Lewis & Allenby* v. *Pegge*, (1913) W. N. 357.

(*e*) *Brigg* v. *Thornton*, (1904) 1 Ch. 386, 395; 73 L. J. Ch. 301.

(*f*) *Mitchell* v. *Reynolds*, 1 P.

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subject to some qualification either as to time or space, are valid if the restraint is reasonably required for the protection of the covenantee (*g*), in his business (*h*), and will be enforced against the covenantor though he entered into the contract while an infant if it was as a whole for his benefit (*i*). Covenants in partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Such restraints upon trade, so far from being injurious to trade, are in many cases necessary for the protection of those engaged in it; instead of cramping, they encourage the employment of capital, and the promotion of industry (*k*).

Wms. 181; *Mallan* v. *May*, 11 M. & W. p. 665; 12 L. J. Ex. 376; 63 R. R. 708; *Davies* v. *Davies*, 36 C. D. 359; 56 L. J. Ch. 962; *Nordenfelt* v. *Maxim-Nordenfelt Gun Co.*, (1894) A. C. p. 565; 63 L. J. Ch. 908; *Dowden* v. *Pook*, (1904) 1 K. B. p. 53; 73 L. J. K. B. 38; *Russell* v. *Amalgamated Society of Carpenters*, (1910) 1 K. B. p. 520, 521; 79 L. J. K. B. 507; *Morris* v. *Ryle*, (1910) 103 L. T. p. 547; 26 T. L. R. 678; *North-Western Salt Co.* v. *Electrolytic Alkali Co.*, (1912) 107 L. T. p. 444.

(*g*) *Hitchcock* v. *Coker*, 6 A. & E. 438; 6 L. J. Ex. 266; *Avery* v. *Langford*, Kay, 662; 23 L. J. Ch. 837; *Badische Anilin Fabrik Co.* v. *Schott*, (1892) 3 Ch. 451; 61 L. J. Ch. 698; *Nordenfelt* v. *Maxim-Nordenfelt Gun Co.*, *supra*; *Underwood* v. *Barker*, (1899) 1 Ch. p. 304; 68 L. J. Ch. 201; *Dowden* v. *Pook*, *supra*; *Leetham* v. *Johnstone-White*, (1907) 1 Ch. pp. 326, 327; 76 L. J. Ch. 304; *Leng* v. *Andrews*, (1909) 1 Ch. pp. 766, 767; 78 L. J. Ch. 80; *Russell* v. *Amalgamated Society of Carpenters*; *Morris* v. *Ryle*, *supra*; *Pearks* v. *Cullen*, (1912) 28 T. L. R. 371; *Mason* v. *Provident Clothing and Supply Co.*, (1913) A. C. 724; 29 T. L. R. 727.

(*h*) *Horner* v. *Graves*, 7 Bing. 735; 9 L. J. (O. S.) C. P. 192; 33 R. R. 625; and see *Leetham* v. *Johnstone-White*, *supra*; *Bromley* v. *Smith*, (1909) 2 K. B. 240, 241; 78 L. J. K. B. 745; *North-Western Salt Co.* v. *Electrolytic Alkali Co.*, (1912) 107 L. T. 439.

(*i*) *Bromley* v. *Smith*, (1909) 2 K. B. p. 242; 78 L. J. K. B. 745; *Leng* v. *Andrews*, (1909) 1 Ch. 763; 78 L. J. Ch. 80; *Gadd* v. *Thompson*, (1911) 1 K. B. 304; 80 L. J. K. B. 272.

(*k*) *Mallan* v. *May*, 11 M. & W. pp. 665, 666; 12 L. J. Ex. 376; 63 R. R. 608; *Mumford* v. *Gething*, 7 C. B. N. S. p. 319; 29 L. J. C. P. 105; 121 R. R. 501; *Leather Cloth Co.* v. *Lorsont*, 9 Eq. p. 354; 39 L. J. Ch. 908; *Nordenfelt* v. *Maxim-Nordenfelt Gun Co.*, (1894) A. C. p. 548; 63 L. J. Ch. 86; and see *Dottridge* v. *Crook*, (1907) 23 T. L. R. 644; *Att.-Gen. for Australia* v. *Adelaide Steamship Co.*, (1913) A. C. p. 795, as to the policy of the law in enforcing covenants in restraint of trade.

In deciding whether a covenant in restraint of trade is reasonable or not, the points to which the attention of the Court is specially directed are the limits of time and space, and the protection required for the trade of the covenantee, the latter point involving an examination of the nature and extent of the trade (*l*). The evidence of persons in the trade as to its nature, and as to what restrictions are customary in it, is admissible, but not their views as to the reasonableness of the particular restraint (*m*).

Reasonableness of restraint a question of law for the judge.

The reasonableness or unreasonableness of a restraint is a question of law for the judge, and not a question of fact for the jury (*n*).

A covenant by which the covenantor is prevented from engaging not merely in a business similar to the one in which he is employed, but also in other businesses of a different nature which do not compete with the covenantee's business, is unreasonable and void (*o*). So also is a covenant by which the covenantee is made the sole judge as to whether a business in which the covenantor intends to engage is or is not the same as that of the covenantee (*p*). The fact that a contract provides for a servant's employment being terminated by his master on short notice does not in itself make a restraint on the servant's right to trade unreasonable (*q*).

(*l*) *Badische Anilin Fabrik Co.* v. *Schott*, (1892) 3 Ch. 447, 451; 61 L. J. Ch. 698; *Hooper and Ashby* v. *Willis*, (1905) 21 T. L. R. 691; *Leng* v. *Andrews*, (1909) 1 Ch. 767, 770; 78 L. J. Ch. 80; *Bromley* v. *Smith*, (1909) 2 K. B. p. 241; 78 L. J. K. B. 745; *Cade* v. *Daly*, (1910) 1 Ir. 319; *Mason* v. *Provident Clothing and Supply Co.*, (1913) A.C. 724; 29 T. L. R. 727.

(*m*) *Haynes* v. *Doman*, (1899) 2 Ch. 13, 24; 68 L. J. Ch. 419. See *Leng* v. *Andrews*, *supra*; *Lovell* v. *Christmas and Wall* (1910), 103 L. T. 588; 27 T. L. R. 95; *Mason* v. *Provident Clothing and Supply Co.*, (1913) A. C. p. 732; 29 T. L. R. p. 728.

(*n*) *Dowden* v. *Pook*, (1904) 1 K. B. 45; 73 L. J. K. B. 38; *Leng* v. *Andrews*, (1909) 1 Ch. pp. 770, 772; 78 L. J. Ch. 80; and see *United Shoe Machinery Co.* v. *Brunet*, (1909) A. C. p. 341; 78 L. J. P. C. 101; *Mason* v. *Provident Clothing and Supply Co.*, *supra*.

(*o*) *Ehrman* v. *Bartholomew*, (1898) 1 Ch. 671; 67 L. J. Ch. 319; *Leatham* v. *Johnstone-White*, (1907) 1 Ch. 322; 76 L. J. Ch. 304; *Leng* v. *Andrews* (1909) 1 Ch. p. 767; 78 L. J. Ch. 419; *Bromley* v. *Smith*, (1909) 2 K. B. 235; 78 L. J. K. B. 745; *Morris* v. *Ryle*, (1910) 103 L. T. 545; 26 T. L. R. 678.

(*p*) *Perls* v. *Saalfeld*, (1892) 2 Ch. 149; 61 L. J. Ch. 409.

(*q*) *Haynes* v. *Doman*, (1899) 2

Release of covenant in restraint of trade.

Provisions in a contract of service restricting the right of a servant to trade on the termination of his employment are avoided by his wrongful dismissal by the covenantee (*r*), or by the covenantee's non-performance and inability to perform the obligations on his part which were the consideration for his servant's covenant in restraint of trade (*s*).

Covenant in restraint of trade—when reasonable.

The reasonableness or unreasonableness of the restriction in respect of space depends in a great measure on the nature of the business and the mode in which it is usually carried on (*t*). No certain and precise boundary can be laid down within which the restraint would be reasonable, and beyond which it would be excessive. Some trades and professions require a limit of a much larger range than others. An area of exclusion which would be unreasonable in one trade or profession is in another necessary for its protection. Businesses, such as those of attorneys, bankers, publishers, &c., &c., which can be carried on by agents and correspondence, fill up and occa - much wider district than those which depend for their s. ss and proper management upon personal superintendence (*u*).

Surgeons, physicians.

Thus, in the case of a surgeon or physician, the borough of Thetford and ten miles round (*x*), a district comprising the town of Macclesfield and seven miles round (*y*), Walsall and

Ch. p. 30; 68 L. J . 1. 419. And see *Ballachulish e Quarries Co.* v. *Grant*, (1903) 5 S. C. 1105.

(*r*) *General Billposting Co.* v. *Atkinson*, (1908) 1 Ch. 537; 77 L. J. Ch. 411; (1909) A. C. 118; 78 L. J. Ch. 77; *Measures Brothers* v. *Measures*, (1910) 2 Ch. 255, 256; 79 L. J. Ch. 707.

(*s*) *Measures Brothers* v. *Measures*, *supra*.

(*t*) *Hitchcock* v. *Coker*, 6 A. & E. 439; 6 L. J. Ex. 266; 45 R. R. 522; *Avery* v. *Langford*, Kay, 663; 23 L. J. Ch. 837; 101 R. R. 800; *Lamson Pneumatic Tube Co.* v. *Phillips*, (1904) W. N. 134; 91 L. T. 363; *Leng* v. *Andrews*, (1909) 1 Ch. p 767; 78 L. J. Ch. 80; *Bromley* v. *Smith*, (1909) 2 K. B. pp. 240, 241; 78 L. J. K. B. 745; *Morris* v. *Ryle*, (1910) 103 L. T. 545; *Mason* v. *Provident Clothing and Supply Co.*, (1913) A. C. 724; 29 T. L. R. 727.

(*u*) *Mallan* v. *May*, 11 M. & W. 653; 12 L. J. Ex. 376; 63 R. R. 708; *Dendy* v. *Henderson*, 11 Exch. 194; 24 L. J. Ex. 324; *Tallis* v. *Tallis*, 1 E. & B. 391; 22 L. J. Q. B. 185; *Rousillon* v. *Rousillon*, 14 C. D. p. 366; 49 L. J. Ch. 338; *Nordenfelt* v. *Maxim-Nordenfelt Gun Co.*, (1894) A. C. pp. 547, 548; 63 L. J. Ch. 908.

(*x*) *Davis* v. *Mason*, 5 T. R. 118; 2 R. R. 562 (fourteen years).

(*y*) *Sainter* v. *Ferguson*, 7 C. B. 716; 18 L. J. C. P. 217.

five miles round (*z*), and a district comprising a radius of ten miles from Newtown (*a*), were held reasonable limits. But in the case of a physician employed in pathological research a radius of ten miles from his employer's laboratories was held unreasonable (*aa*). In the case of a chemist, Taunton and three miles round (*b*) was held a reasonable limit. In the case of a dentist the city of Chester or the counties of Chester, Flint or Denbigh and sixteen miles round (*c*); and London (*d*), were held to be reasonable limits; but York and 100 miles round was held to be an unreasonable limit (*e*). In the case of a solicitor five miles from Brentford Town Hall (*f*), seven miles from Walsall (*g*), Ilkestone or any place within ten miles thereof (*h*), twenty-one miles from Torquay (*i*), fifty miles from Weymouth (*k*), London and 150 miles round (*l*) London, Middlesex and Essex (*m*), fifteen miles from Masham Market Cross (*n*), Great Britain (*o*),

Pathologist.

Chemist.

Dentist.

Solicitor.

(*z*) *Everton* v. *Longmore*, 15 T. L. R. 356.

(*a*) *Palmer* v. *Mallett*, 36 C. D. 411. See also *Giles* v. *Hart*, 5 Jur. N. S. 1381; 8 W. R. 74 (five miles); *Carnes* v. *Nesbitt*, 7 H. & N. 778; 31 L. J. Ex. 273 (five miles); *Gravely* v. *Barnard*, 18 Eq. 521; 43 L. J. Ch. 659 (ten miles).

(*aa*) *Eastes* v. *Russ*, (1914) 136 L. T. Journal, 252 (Cozens-Hardy M.R. and Buckley L.J., Swinfen-Eady L.J. diss.).

(*b*) *Hitchcock* v. *Coker*, 6 A. & E. 438; 6 L. J. Ex. 266.

(*c*) *Bullin* v. *Teece*, (1868) W. N. 196.

(*d*) *Mallan* v. *May*, 11 M. & W. 653; 12 L. J. Ex. 376; 63 R. R. 708. As to meaning of "London," see *Mallan* v. *May*, 13 M. & W. 511; 14 L. J. Ex. 707; 67 R. R. 707; *Wallace* v. *Att.-Gen.*, 33 L. J. Ch. 314; *Palace Theatre Co.* v. *Cleusy*, (1909) 26 T. L. R. 28; and see *Provident Clothing Supply Association* v. *Mason*, (1913) 1 K. B. 65; 29 T. L. R. 57, where it was held that evidence was admissible to explain the meaning of the word (reversed on other grounds, (1913) A. C. 724; 29 T. L. R. 727). As to the meaning of "neighbourhood," see *Stride* v. *Martin*, 77 L. T. 600.

(*e*) *Horner* v. *Graves*, 7 Bing. 735; 9 L. J. (O. S.) C. P. 192; 33 R. R. 635.

(*f*) *Woodbridge* v. *Bellamy*, (1911) 1 Ch. p. 333; 80 L. J. Ch. 265.

(*g*) *Duignan* v. *Walker*, 28 L. J. Ch. 867.

(*h*) *Cattle* v. *Thorpe*, (1900) W. N. 83.

(*i*) *Deudy* v. *Henderson*, 11 Exch. 194; 24 L. J. Ex. 324.

(*k*) *Howard* v. *Woodward*, 34 L. J. Ch. 47; 13 W. R. 132.

(*l*) *Bunn* v. *Guy*, 4 East, 190; 7 R. R. 560.

(*m*) *May* v. *O'Neill*, 44 L. J. Ch. 660.

(*n*) *Edmundson* v. *Render*, (1904) 90 L. T. 814; S. C. (1905) 2 Ch. 320; 74 L. J. Ch. 585.

(*o*) *Whittaker* v. *Howe*, 3 Beav. 383; 52 R. R. 162 (twenty years). But see *Nordenfelt* v. *Maxim-*

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were held reasonable limits; and a covenant by a solicitor's clerk not to act for any persons who should be clients of his employer's firm at the time when his engagement terminated, or within five years before that time, was held reasonable (*p*).

Stockbroker.

In the case of a stockbroker, Cardiff and fifty miles round was held reasonable (*q*).

Architect and surveyor.

In the case of an architect and surveyor, ten miles from Cardiff Town Hall (*r*), ten miles from Bromsgrove Town Hall (*s*), were held reasonable limits.

Insurance agent.

In the case of an agent to an insurance company, fifty miles from the company's headquarters (*t*) was held a reasonable limit.

Builder's merchant.

In the case of a builder's merchant, thirty miles from Bournemouth, or the Bargate at Southampton, was held unreasonable (*u*).

Perfumer.

In the case of a perfumer and hair merchant, London and Westminster was held a reasonable, but London and Westminster and 600 miles round was held an unreasonable limit (*x*).

Horsehair manufacturer.

In the case of a horsehair manufacturer, Birmingham and 200 miles round was held a reasonable limit (*y*).

Tailor.

In the case of a tailor, ten miles round a circuit from Charing Cross (*z*), and twenty miles from a certain house in Cornhill were held reasonable limits (*a*). But Weybridge or the City of London or at any of the employer's addresses in the future was held unreasonable (*b*).

Glove manufacturer.

In the case of a glove manufacturer, Woodstock and its neighbourhood was held a reasonable limit (*c*).

Milkman.

In the case of a milkman, five miles from Northampton Square, in the County of

(*p*) *Nordenfelt Gun Co.*, (1894) A. C. p. 545; 63 L. J. Ch. p. 913.

(*p*) *Lewis* v. *Durnford*, (1907) 24 T. L. R. 64.

(*q*) *Lyddon* v. *Thomas*, (1901) 17 T. L. R. 450 (twenty years).

(*r*) *Robertson* v. *Willmott*, (1909) W. N. 155; 25 T. L. R. 681 (five years).

(*s*) *Gadd* v. *Thompson*, (1911) 1 K. B. 304; 80 L. J. K. B. 272 (ten years) (covenant by an infant).

(*t*) *General Accident Insurance Co.* v. *Noel*, (1902) 1 K. B. 377; 71 L. J. K. B. 236 (one year).

(*u*) *Hooper* v. *Willis*, (1905) 94 L. T. 624; 22 T. L. R. 451.

(*x*) *Price* v. *Green*, 16 M. & W. 346; 16 L. J. Ex. 108; 73 R. R. 520.

(*y*) *Harme* v. *Parsons*, 32 Beav. 328

(*z*) *Nicoll* v. *Beere*, 53 L. T. 659.

(*a*) *Rolfe* v. *Rolfe*, 15 Sim. 88; 74 R. R. 25; see also *Newling* v. *Dobell*, 38 L. J. Ch. 111; (1868) W. N. 269; *Wolmershausen* v. *O'Connor*, (1877) W. N. 113; 36 L. T. 921; *Baker* v. *Hedgcock*, 39 C. D. 520.

(*b*) *Beetham* v. *Fraser*, (1904) 21 T. L. R. 8.

(*c*) *Daggett* v. *Ryman*, 16 W. R. 302; (1868) W. N. 3.

Middlesex (*d*), three miles from Charles Street, Grosvenor Square (*e*), and four miles from the employer's business (*f*), were held reasonable limits, and so was a covenant not to retail milk in the "neighbourhood" of a certain place (*g*). In the case of a wine and spirit merchant, a limit comprising the three counties of Carnarvon, Anglesey, and Merioneth (*h*), and Burton and fifty miles round (*i*), were held reasonable limits. In the case of a manufacturer of brewing materials carrying on business in England and other countries, a covenant by a manager unlimited in area, but limited to a period of five years, was held reasonable (*k*). On the other hand, a covenant by a manager to a cider merchant not to carry on business anywhere as a cider merchant for the term of five years after leaving his employer's service was held unreasonable, the area being unlimited, while the employer's business was substantially carried on in one locality (*l*). In the case of [illegible] merchant's agent, a radius of eight miles from the Post [illegible] in London was held reasonable (*m*). In the case of the trade of a general merchant in a country district, a limit comprising a considerable section of Cornwall was held reasonable (*n*). In the case of publishers, London and 150 miles from the Post Office, Dublin, Edinburgh, or any other town in which the covenantees might have had an establishment within six months previous to the date of the covenant (*o*), and the City of London or within twenty miles thereof (*p*), were held

Wine and spirit merchant.

Manufacturer of brewing materials.

Cider merchant.

Oil merchant's agent.

General merchant.

Publisher.

(*d*) *Proctor* v. *Sargent*, 2 Man. & Gr. 20; 10 L. J. C. P. 34; 58 R. R. 312; and see *Musselwhite* v. *Spicer*, (1879) W. N. 74.

(*e*) *Benwell* v. *Inns*, 24 Beav. 307; 26 L. J. Ch. 663.

(*f*) *Reeve* v. *Jennings*, (1910) 2 K. B. 522; 79 L. J. K. B. 1137 (three years); on appeal to the Divisional Court the action failed, the agreement not being in writing as required by the Statute of Frauds.

(*g*) *Strode* v. *Martin*, 77 L. T. 600; *Bubowski* v. *Goldstein*, (1896) 1 Q. B. 478; 65 L. J. Q. B. 397.

(*h*) *Turner* v. *Evans*, 2 De G. M. & G. 740; 22 L. J. Q. B. 412; 95 R. R. 312.

(*i*) *Parsons* v. *Cottrell*, 56 L. T. 839 (traveller).

(*k*) *White, Tompkins and Courage* v. *Wilson*, (1907) 23 T. L. R. 469.

(*l*) *Worden* v. *Pook*, (1904) 1 K. B. 45; 73 L. J. K. B. 38.

(*m*) *Middleton* v. *Brown*, 47 L. J. Ch. 411; 38 L. T. 334.

(*n*) *Avery* v. *Langford*, Kay, 663; 23 L. J. Ch. 837; 101 R. R. 800.

(*o*) *Tallis* v. *Tallis*, 1 E. & B. 391; 22 L. J. Q. B. 185.

(*p*) *Welstead* v. *Hadley*, (1904) 21 T. L. R. 165 (ten years).

reasonable limits. But in the case of a newspaper business, a covenant restraining a junior reporter from being connected on his own account or in partnership with any other person as proprietor, employee or otherwise, with any other newspaper business in Sheffield or within twenty miles thereof was held unreasonable (*q*). In the case of a coaching business, a covenant not to run any coach from Reading to London was enforced by injunction (*r*). In the case of a carrier, a covenant not to carry goods between London and numerous towns in Norfolk (*s*), and an agreement by a carrier's clerk not to carry on or be engaged in business as a carrier in London, Liverpool and New York, or within fifty miles of such cities (*t*), were held reasonable. In the case of a butcher, a limit of five miles was held reasonable (*u*). But in the case of a manager of a meat importer's business, a covenant not to be engaged in such a business in the United Kingdom for a year was held unreasonable (*uu*). In the case of a gas meter manufacturer, twenty miles from Westminster (*x*), in the case of a clerk to a manufacturer of enamelled hollow-ware, 150 miles from Wolverhampton (*y*), in the case of a clerk to a manufacturer of hardware, twenty-five miles from Dudley (*z*), in the case of an assistant to a baker or confectioner ten miles of Great Clacton (*a*), in the case of a dressmaker, ten miles of Mildenhall (*b*), in the case of a music hall artist, twenty miles of Manchester (*c*), were held reasonable limits. In the case of a company supplying pneumatic tubes for conveying cash and bills to and from the cashier's desk in shops, a covenant

Newspaper reporter.

Coaching business.

Carrier.

Butcher.

Meat importer's manager.

Gas meter manufacturer.

Clerks of manufacturers of hollow-ware and hardware.

Baker's assistant.

Dressmaker.

Music hall artist.

Pneumatic tube and indiarubber goods manufacturers.

(*q*) *Leng* v. *Andrews*, (1909) 1 Ch. 763; 78 L. J. Ch. 80.

(*r*) *Williams* v. *Williams*, 2 Sw. 253. See *Leighton* v. *Wales*, 3 M. & W. 545 (London and Croydon).

(*s*) *Archer* v. *Marsh*, 6 A. & E. 959; 6 L. J. K. B. 244.

(*t*) *Davies* v. *Lowen*, 64 L. T. 655.

(*u*) *Elves* v. *Croft*, 10 C. B. 241; 19 L. J. C. P. 385; 84 R. R. 553.

(*uu*) *Nevanas & Co.* v. *Walker*, (1913) W. N. 315; (1914) 136 L. T. Journal, 252.

(*x*) *Clarkson* v. *Edge*, 33 Beav. 227; 33 L. J. Ch. 443.

(*y*) *Robinson* v. *Herrier*, (1898) 2 Ch. 451; 67 L. J. Ch. 644.

(*z*) *Haynes* v. *Doman*, (1899) 2 Ch. 13; 68 L. J. Ch. 419.

(*a*) *Bromley* v. *Smith*, (1909) 2 K. B. 235, 241; 78 L. J. K. B. 745 (three years).

(*b*) *Stiles* v. *Ecclestone*, (1903) 1 K. B. 544; 72 L. J. K. B. 256 (period unlimited).

(*c*) *Tivoli, Manchester* v. *Colley*, (1904) 20 T. L. R. 437; 50 W. R. 632.

by the managing director not to be engaged in any similar business in the Eastern Hemisphere for a period of five years (*d*), and in the case of manufacturers of indiarubber goods a covenant by their traveller not to deal in such goods in the United Kingdom (*dd*), were held reasonable. But in the case of a clothing company a covenant by their canvasser not to enter the employment of any person carrying on a similar business within twenty-five miles of London, in the county of Middlesex (*e*), was held unreasonable. In the case of provision merchants, a covenant by their shop assistant not to carry on or be engaged in, or interested in a business similar to that of his employers within two miles of any of their shops for the time being at which he had been employed within twelve months of leaving their employ was held unreasonable having regard to the nature of his employment (*f*). In the case of the business of an advertising agent, a covenant by an employee not to carry on or be engaged directly or indirectly in any similar business in the United Kingdom was held unreasonable (*g*).

Canvasser and collector.

Clothing company.

Shop assistant.

Advertising agent.

When the restraint is limited in point of space, the distance in question is to be measured in a straight line upon a horizontal plane, unless it is expressly, or by necessary implication, directed to be measured by the most practicable mode of access (*h*). Where under an agreement business was restrained from being carried on at "Ilkestone or within ten miles thereof," it was held that the area should be taken from the borough boundary (*i*). And where business was prohibited within twenty-five miles of "London in the county

Measurement of distance.

(*d*) *Lamson Pneumatic Tube Co.* v. *Phillips*, (1904) 91 L. T. 363; W. N. 134.

(*dd*) *Continental Tyre and Rubber Co.* v. *Heath*, (1913) 29 T. L. R. 308.

(*e*) *Mason* v. *Provident Clothing Supply Co.*, (1913) A. C. 724; 29 T. L. R. 727.

(*f*) *Fearks* v. *Cullen*, (1912) 28 T. L. R. 371, the employee's duty being merely to serve at the counter.

(*g*) *Stuart* v. *Halstead*, (1911) 55 S. J. 598.

(*h*) *Leigh* v. *Hind*, 9 B. & C. 774; 7 L. J. (O. S.) K. B. 313; 33 R. R. 323; *Atkyns* v. *Kinnear*, 4 Ex. 776; 19 L. J. Ex. 132; 80 R. R. 767; *Duignan* v. *Walker*, John. 446; 28 L. J. Ch. 867; 123 R. R. 186; *Monflet* v. *Cole*, L. R. 8 Ex. 32; 42 L. J. Ex. 8.

(*i*) *Cattle* v. *Thorpe*, (1900) W. N. 83.

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of Middlesex," evidence was admitted to explain the exact area intended by the parties (*k*).

Covenant on dissolution of partnership.

A covenant on the dissolution of a partnership that the retiring partner shall not, if he set up a similar business, hold himself out to have been or seek to induce others to believe him to have been formerly connected in business as partner, manager, or servant with the plaintiff, is not too wide, and will be enforced by injunction (*l*).

Covenant by vendor of business.

Nor is a covenant by a vendor of a business and the goodwill thereof that he will not carry on the business of a manufacturer for a term of years under a particular style or name void, as being a covenant in restraint of trade, notwithstanding that it may be unlimited in point of space (*m*).

Covenant by licensee of patent.

A covenant by the licensee of a patent not to make or sell any of the articles, which are the subject of the patent, without the invention applied to them, is not void as being in restraint of trade (*n*).

Agreement among traders to keep up prices.

An agreement between traders not to sell their goods below a certain price for the purpose of protecting their local trade is not necessarily invalid as being in restraint of trade, and will be enforced by injunction if the limits of time and space are reasonable (*o*). So also where a purchaser of a manufacturer's goods agreed not to sell them below a certain price, and that when he resold them to the trade he would procure a similar signed agreement from the retailers, the contract was held valid (*p*). So also a covenant by a lessee of

(*k*) *Provident Clothing and Supply Co.* v. *Mason*, (1913) 1 K. B. 65; 29 T. L. R. 57 (overruled on other grounds, (1913) A. C. 724; 29 T. L. R. 727).

(*l*) *Wolmershausen* v. *O'Connor*, 36 L. T. 921.

(*m*) *Hallam* v. *Vernon*, 34 C. D. 748; 56 L. J. Ch. 115. See *Mason* v. *Provident Clothing and Supply Co.*, (1913) A. C. pp. 731, 737, 738; 29 T. L. R. 727.

(*n*) *Jones* v. *Lees*, 1 H. & N. 189; 26 L. J. Ex. 9. See *Maxim-Nordenfelt Gun Co.* v. *Nordenfelt*, (1893) 1 Ch. p. 657; 62 L. J. Ch. p. 286; *Mouchell* v. *Cubitt*, (1907) 24 R. P. C. p. 201.

(*o*) *Cade* v. *Daly*, (1910) 1 Ir. 306; and see *Mogul Steamship Co.* v. *McGregor*, (1892) A. C. pp. 25, 36; 61 L. J. Q. B. 295; *Att.-Gen. of Australia* v. *Adelaide Steamship Co.*, (1913) A. C. 794. In *Urmston* v. *Whitelegg*, 63 L. T. 455, the Court refused to enforce an agreement by traders not to sell aerated waters below a certain price for ten years without limit of space.

(*p*) *Elliman* v. *Carrington*, (1901)

machines not to use the lessor's machines in conjunction with the machinery of other firms in the manufacture of certain goods was held not void as being in restraint of trade (*q*).

Illegal contract not enforced though defendant has not raised question of illegality.

Where a contract is illegal, the Court will not enforce it, though the defendant may not have raised in his defence the question of illegality (*r*).

Covenant by purchaser to take beer from vendor.

Where the plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted with him that he should have the exclusive right of supplying beer to any public-house erected on the land, it was held that the covenant was a reasonable one and might be enforced against a member of the society, a brewer, who had acquired part of the land with notice of the covenant, and having erected thereon a public-house was supplying the same with his own beer (*s*); and where a lessee of a public-house covenanted with his lessors that he and his assigns would not during the term sell on the demised premises any malt liquors other than such as should have been purchased of the lessors, and owing to increased licence duties the lessors raised the price of their beer, an injunction was granted restraining an assignee of the lease during the remainder of the term from purchasing his malt liquors from other brewers at the old prices, the duration of the injunction being limited to so long as the lessors should be ready and willing to supply the assignees of the lease with malt liquors of reasonable quality and at reasonable prices (*t*).

Covenant by lessee to buy beer from lessor.

Divisibility of covenant.

An agreement in restraint of trade may be divisible. Where an agreement of the sort contains a stipulation which is capable of being construed divisibly, and one part is void, as

2 Ch. 275; 70 L. J. Ch. 577; *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.*, (1913) 29 T. L. R. 270.

(*q*) *United Shoe Company of Canada* v. *Brunet*, (1909) A. C. 330; 78 L. J. P. C. 101.

(*r*) *North-Western Salt Co.* v. *Electrolytic Alkali Co.*, (1912) 107 L. T. 439, 446.

(*s*) *Catt* v. *Tourle*, 4 Ch. 654; 38 L. J. Ch. 665. As to form of order, see *Courage & Co.* v. *Carpenter*, (1910) 1 Ch. 262, 269; 79 L. J. Ch. 184. See also *Luker* v. *Dennis*, 7 C. D. 227; 47 L. J. Ch. 174, *Haulbury* v. *Cundy*, 58 L. T. 155; *White* v. *Southend Hotel Co.*, (1897) 1 Ch. 767; 66 L. J. Ch. 387; *Manchester Brewery Co.* v. *Coombs*, (1901) 2 Ch. 608; 70 L. J. Ch. 814; *O'Leary* v. *Deasy*, (1911) 2 I. R. pp. 453, 455.

(*t*) *Courage & Co.* v. *Carpenter*, *supra*.

being unreasonable, while the other is not, the latter will be upheld, and the contract will not be held void altogether (*u*). But the Court cannot create or carve out a new covenant for the sake of making a stipulation valid which would otherwise be void (*x*). Thus where a tailor's cutter covenanted that he would not enter into any engagement or be concerned in carrying on any business within a certain period of time and area, the Court refused to construe the covenant as one merely not to carry on the business of a tailor, and held the covenant void as being in general restraint of trade (*y*).

Covenants too vague to be enforced.

A covenant by a partner to retire from the business "so far as the law allows" (*z*), and a covenant by a servant "not to enter into any business engagement in competition with or that will in any way interfere with the business of his master" (*a*), have been held too vague for the Courts to enforce.

Consideration of contracts in restraint of trade.

According to the earlier cases a covenant in restraint of trade was void, unless the consideration was adequate to the restriction; but, since *Hitchcock* v. *Coker* (*b*), it may be considered as settled at law that the adequacy of the consideration will not be inquired into, and that if there be a legal consideration of value the contract will be upheld without reference to the amount of value (*c*). A Court of equity

(*u*) *Mallan* v. *May*, 11 M. & W. 664; 12 L. J. Ex. 376; 63 R. R. 708; *Price* v. *Green*, 13 M. & W. 696; 16 M. & W. 346; 16 L. J. Ex. 108; 73 R. R. 522; *Nicholls* v. *Stretton*, 10 Q. B. 346; 74 R. R. 320; *Baines* v. *Geary*, 35 C. D. 154; 56 L. J. Ch. 935; *Rogers* v. *Maddocks*, (1892) 3 Ch. 346; 62 L. J. Ch. 219; *Dubowski* v. *Goldstein*, (1896) 1 Q. B. 478; 65 L. J. Q. B. 397; *Haynes* v. *Doman*, (1899) 2 Ch. 13, 24; 68 L. J. Ch. 419; *Hooper* v. *Willis*, (1905) 94 L. T. 624; 22 T. L. R. 451; *Leng* v. *Andrews*, (1909) 1 Ch. p. 767; 78 L. J. Ch. 80; *Bromley* v. *Smith*, (1909) 2 K. B. 235; 78 L. J. K. B. 745; *Continental Tyre and Rubber Co.* v. *Heath*, (1913) 29 T. L. R. 308; *Caribonum Co.* v. *Le Couch*, (1913) 109 L. T. 385; *Nevanas & Co.* v. *Walker*, (1913) W. N. 373; (1914) 136 L. T. Journal, 252.

(*x*) *Baker* v. *Hedgecock*, 39 C. D. 520; 57 L. J. Ch. 889; *Perls* v. *Saalfeld*, (1892) 2 Ch. 149; 61 L. J. Ch. 409; cf. *Hood* v. *Jones*, 81 L. T. 169; *Barr* v. *Craven*, (1903) 89 L. T. 574; 20 T. L. R. 51.

(*y*) *Baker* v. *Hedgecock*, 39 C. D. 520; 57 L. J. Ch. 889.

(*z*) *Davies* v. *Davies*, 36 C. D. 359; 56 L. J. Ch. 962.

(*a*) *Beetham* v. *Fraser*, (1904) 21 T. L. R. 8.

(*b*) 6 A. & E. 438; 6 L. J. Ex. 266; 45 R. R. 522.

(*c*) *Pilkington* v. *Scott*, 15 M. &

may, however, at its discretion, decline to interfere where the disproportion between the restriction and the consideration is so great as to satisfy the Court that the one party has taken an unfair advantage of the other (*d*). The consideration need not be stated in express terms in the instrument. It is enough if it can be inferred (*e*).

No implied covenant by vendor of goodwill not to compete.

There is not any implied covenant or promise on the part of the vendor or assignor of the goodwill of a business not to set up the same trade in opposition to the purchaser in the neighbourhood of the spot where the business is carried on (*f*), although he may not solicit his old customers (*g*), even when they have of their own accord come to him (*h*). But although the sale of a goodwill does not imply a contract on the part of the vendor not to set up again in a similar business, he is not at liberty to hold out to the public that he is continuing the same business by using the name of the old firm if it is an adopted name (*i*), but he cannot be restrained from carrying on business in his own name, if he takes proper precautions to prevent the public from being deceived (*k*). Where the lease of a house and goodwill of a trade had been sold and assigned upon a verbal understanding that the vendor should not set up the same trade in the same street, he was restrained by injunction from infringing the oral contract (*l*).

May not solicit old customers.

Construction and effect of restrictive covenants

Contracts in restraint of trade are construed with reference to the subject-matter, like other contracts, and fairly, without any bias on one side or the other (*m*). Where a provision is

W. 657; 15 L. J. Ex. 329; 71 R. R. 781; *Gravely* v. *Barnard*, 18 Eq. 521; 43 L. J. Ch. 659; *Davies* v. *Davies*, 36 C. D. 359; 56 L. J. Ch. 962; *Collins* v. *Locke*, 4 A. C. p. 686; 48 L. J. P. C. 68.

(*d*) *Middleton* v. *Brown*, 47 L. J. Ch. 411.

(*e*) *Gravely* v. *Barnard*, 18 Eq. 522; 43 L. J. Ch. 659.

(*f*) *Cruttwell* v. *Lye*, 17 Ves. 346; 11 R. R. 98; *Trego* v. *Hunt*, (1896) A. C. 7; 65 L. J. Ch. 1; *Curl Brothers* v. *Webster*, (1904) 1 Ch. 685; 73 L. J. Ch. 540.

(*g*) *Trego* v. *Hunt*, *supra*.

(*h*) *Curl Brothers* v. *Webster*, *supra*.

(*i*) *Churton* v. *Douglas*, John. 174; 28 L. J. Ch. 841; 123 R. R. 56.

(*k*) *Turton* v. *Turton*, 42 C. D. 128; 58 L. J. Ch. 677; *Cash* v. *Cash*, (1902) 86 L. T. 211; W. N. 32; *John Brinsmead & Sons* v. *Stanley Brinsmead*, (1913) 29 T. L. R. 237, 706.

(*l*) *Harrison* v. *Gardner*, 2 Madd. 198; 17 R. R. 207.

(*m*) *Mills* v. *Dunham*, (1891) 1 Ch. 576; 60 L. J. Ch. 362; *Cattermoul* v. *Jarred*, (1909) 53 S. J. 244.

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ambiguous, a construction which will make it valid is preferred to one which will make it void (*n*). Where the vendor of a public-house business and premises had covenanted not to exercise, carry on, or be concerned in any "house" for the sale of exciseable liquors within a certain area during the purchaser's occupancy of the premises, the word "house" was construed as meaning public or licensed house, and not as any premises upon which the sale of liquors might be carried on (*o*).

A man who has covenanted not to carry on business in his own name, or for his own benefit, or in the name of or for the benefit of any other person within a certain district, is not prevented from soliciting orders within the district for a third person who is carrying on business beyond the district (*p*), but he may not solicit orders for his own benefit within the prescribed limits, though he has no residence, shop, or place of business within them (*q*), or send goods to places within the prescribed limits from a place beyond them, where he is carrying on business (*r*). So also a covenant by the vendor on the sale of a medical practice not to solicit any patients within a certain radius, or otherwise directly or indirectly to enter into competition with the purchaser, is broken by the vendor coming into the defined area and attending patients although at their express request (*s*). So also a covenant by a solicitor "not to do any work or act usually done by solicitors" within a certain radius is broken by writing a solicitor's letter outside the area to persons residing within (*t*), or by preparing the will of a person residing within the area on instructions received with-

(*n*) Ibid.; see *Mason* v. *Provident Clothing and Supply Co.*, (1913) A. C. p. 745.

(*o*) *Cattermoul* v. *Jarred*, (1909) 53 S. J. 244.

(*p*) *Clarke* v. *Watkins*, 9 Jur. N. S. 142.

(*q*) *Turner* v. *Evans*, 2 E. & B. 512; 2 De G. M. & G. 740; 22 L. J. Q. B. 412; 95 R. R. 312; see *Woodbridge* v. *Bellamy*, (1911) 1 Ch. p. 337; 80 L. J. Ch. 265.

(*r*) *Brampton* v. *Beddoes*, 13 C. B. N. S. 538; 11 W. R. 268.

(*s*) *Rogers* v. *Drury*, 57 L. J. Ch. 504.

(*t*) *Edmundson* v. *Render*, (1905) 2 Ch. 320; 74 L. J. Ch. 585; see *Woodbridge* v. *Bellamy*, (1911) 1 Ch. p. 341; 80 L. J. Ch. 265.

out the radius (*u*). But a covenant by a solicitor not to carry on within a certain radius "the profession of a solicitor" is not broken by merely writing a solicitor's letter from his office outside the radius on behalf of a client residing within the radius to a person also residing within the prohibited area (*x*), and an agreement by a solicitor not to practise or act as a solicitor within a certain area was held not to be broken by a single act of a solicitor within the area and the writing of a few letters, the Court construing the agreement as meaning "substantially acting as solicitor and not as referring to isolated acts" (*y*).

Construction and effect of restrictive covenants.

A covenant not to carry on, or be concerned in carrying on, either directly or indirectly, a particular business, or sell any goods in any way connected with that business, is broken by selling goods as a journeyman in the employment of a person carrying on that business (*z*). So also an agreement by a man not to carry on a particular business, directly or indirectly, either alone or in partnership with or with the assistance of any other person, is broken by his carrying it on as manager to another person (*a*), and a covenant by a manager of a business "not to be concerned or interested in" a similar business is broken by becoming a manager of a rival firm (*b*), and a covenant by a buyer in a firm of haberdashers not to "engage" in a similar business is broken by entering the service of a rival firm in a similar capacity at a fixed salary (*c*), and a covenant by a servant of a trader not to be engaged, concerned or interested in or carry on a similar trade or business (*d*) is broken by entering the employment of a rival

(*u*) *Edmundson* v. *Render*, (1904) 90 L. T. 814.

(*x*) *Woodbridge* v. *Bellamy*, (1911) 1 Ch. 327; 80 L. J. Ch. 265.

(*y*) *Freeman* v. *Fox*, (1912) 55 S. J. 650.

(*z*) *Jones* v. *Heavens*, 4 C. D. 636; 25 W. R. 460; see *Newling* v. *Dobell*, 38 L. J. Ch. 111; *Hill* v. *Hill*, 35 W. R. 137.

(*a*) *Dales* v. *Weaber*, 18 W. R. 993.

(*b*) *Cavendish* v. *Tarry*, (1908) 52 S. J. 726.

(*c*) *Watts* v. *Smith*, 62 L. T. 453; see *Pearks* v. *Cullen*, (1912) 28 T. L. R. p. 372.

(*d*) As to the difference between a covenant not to carry on "a trade" and a covenant not to carry on a business or profession; see *Robertson* v. *Willmott*, (1909) 25 T. L. R. 681; W. N. 155.

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trader as a servant (*e*). So also a covenant by a clerk not to carry on business as a surgeon within certain limits is broken by his acting as assistant to a surgeon (*f*). So also a covenant by a clerk not to practise as an architect or surveyor within a certain radius is broken by acting as manager to another architect at a fixed salary (*g*). A covenant not to become interested in a similar business to that of the covenantee is not broken by the covenantor entering such a business as a servant at a fixed salary (*h*). A covenant by a traveller not to interfere with, prejudice, or affect the business or reputation of his master or solicit his customers, is not broken by setting up a rival business, provided he does not solicit his late master's customers (*i*), and an agreement by a man not to carry on a particular trade either in his own name or in that of any other person is not broken by his carrying it on as clerk or assistant to another person at a fixed salary (*k*).

A covenant not to be engaged in a specified trade or "in any way, matter, or thing whatsoever, in anywise relating thereto," within a given district does not prevent the covenantor from lending money to a person engaged in such trade within the district, upon mortgage of his trade premises, although he may know that the mortgagor has no means of paying the debt except out of the profits of the business, but he may not retain any direct hold on the profits of the business (*l*).

A covenant not to carry on or be interested in the business of a provision merchant is not broken by the manufacture and sale of margarine (*m*).

Benefit of covenant passes with goodwill.

The benefit of a covenant in restraint of trade passes to an assign either of the goodwill or of the beneficial interest in

(*e*) *Cade* v. *Calfe*, (1906) 22 T. L. R. 243.

(*f*) *Palmer* v. *Mallett*, 36 C. D. 411; 57 L. J. Ch. 226.

(*g*) *Robertson* v. *Willmott*, (1909) 25 T. L. R. 681; W. N. 155.

(*h*) *Gophir Diamond Co.* v. *Wood*, (1902) 1 Ch. 950; 71 L. J. Ch. 550.

(*i*) *Reeve* v. *Marsh*, (1906) 23 T. L. R. 25.

(*k*) *Allen* v. *Taylor*, 39 L. J. Ch. 627; 19 W. R. 35, 557.

(*l*) *Bird* v. *Lake*, 1 H. & M. 338; see *Smith* v. *Hancock*, (1894) 2 Ch. p. 385; 63 L. J. Ch. 477, and *Cory* v. *Harrison*, (1906) A. C. 274; 75 L. J. Ch. 714.

(*m*) *Lovell and Christmas* v. *Watt*, (1906) 104 L. T. 35; 27 T. L. R. 236.

the business (*n*), and the agreement may be enforced by the assign, although assigns are not expressly mentioned in the covenant (*o*). But where a covenant in restraint of trade is in its nature and in its true construction a personal one, it cannot be assigned (*p*).

Contracts with a penalty. Liquidated damages.

A sum of money is sometimes named in an instrument as payable upon the breach of a covenant. In such cases the Court has to determine whether the contract will be satisfied by the payment of the sum named in the instrument, or whether it will not: whether, in other words, the sum named was inserted by way of penalty to secure the performance of the agreement, or whether it was the intention of the parties that the act might be done on the payment of the sum named as an equivalent. If the covenant is an absolute one, and the sum named as payable upon breach has been inserted by way of penalty to secure the performance of the covenant, the payment of the penalty does not oust the Court of its jurisdiction to prevent the doing of the act stipulated not to be done (*q*). "A penalty," said Lord Loughborough (*r*), "is never considered in this Court as the price of doing a thing which a man has expressly agreed not to do." But if the real intent and meaning of the contract is that a man should have the power, if he chooses, to do a particular act upon the payment of a certain specified sum, the power to do the act upon the payment of the sum agreed on is part of the express con-

(*n*) *Jacoby* v. *Whitmore*, 49 L. T. 335; 32 W. R. 18; *Townsend* v. *Jarman*, (1900) 2 Ch. 698; 69 L. J. Ch. 823; *Welstead* v. *Hadley*, (1904) 21 T. L. R. 165; *Leetham* v. *Johnstone-White*, (1907) 1 Ch. p. 327; 76 L. J. Ch. p. 307; *Automobile Carriage Builders* v. *Sayers*, (1909) 101 L. T. 419; cf. *Berlitz School of Languages* v. *Duchene*, (1904) S. C. 181.

(*o*) *Jacoby* v. *Whitmore*, *supra*; see *White* v. *Southend Hotel Co.*, (1897) 1 Ch. 767; 66 L. J. Ch. 387.

(*p*) *Davies* v. *Davies*, 36 C. D. 359; 56 L. J. Ch. 962; see *Welstead* v. *Hadley*, (1904) 21 T. L. R. 166; and *Rodger* v. *Herbertson*, (1909) S. C. 256.

(*q*) *French* v. *Macale*, 2 Dr. & War. 269; 59 R. R. 675; *Coles* v. *Sims*, 5 De G. M. & G. 1; 23 L. J. Ch. 258; *Fox* v. *Scard*, 33 Beav. 327; *Jones* v. *Heavens*, 4 C. D. 636; 25 W. R. 460; *London and Yorkshire Banking Co.* v. *Pritt*, 56 L. J. Ch. 967, and see *Forrest* v. *Merry & Cunninghame*, (1909) A. C. 417; 101 L. T. 138; *Mason* v. *Provident Clothing and Supply Co.*, (1913) A. C. p. 730.

(*r*) *Hardy* v. *Martin*, 1 Cox, 26.

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tract between the parties; and the Court will neither compel him to abstain from doing it nor relieve him, if he does do it, from the payment of the sum agreed on as an equivalent (*s*).

The mere use of the terms "penalty," "forfeit" or "liquidated damages" in a covenant is not conclusive as to the meaning of the instrument, and does not determine the intention of the parties. Like any other question of construction, the intention is to be gathered from the nature of the agreement, and the language of the whole instrument taken together, regard being had to all the circumstances of the case at the time when the bargain was made (*t*). If it appear from the agreement, taken as a whole, that the sum specified was not intended by the parties to be liquidated damages, it will be treated as a penalty, although the words "liquidated damages" may have been used (*u*). On the other hand, if the sum is not a penal sum, it will not be treated as a penalty merely because it is called so in the agreement (*x*). But

(*s*) *French* v. *Macale*, 2 Dr. & War. 269; 59 R. R. 675; *Sainter* v. *Ferguson*, 7 C. B. p. 728; 18 L. J. C. P. 217; 84 R. R. 57; 1 Mac. & G. p. 289; 19 L. J. Ch. 170; *Gerrard* v. *O'Reilly*, 3 Dr. & War. 414; 61 R. R. 97; *Ranger* v. *Great Western Railway Co.*, 5 H. L. C. 94; 101 R. R. 46; *Young* v. *Chalkley*, 16 L. T. 286.

(*t*) *Dimech* v. *Corlett*, 12 Moo. P. C. p. 229; 124 R. R. 26; *Mercer* v. *Irving*, El. Bl. & El. 563; 27 L. J. Q. B. 291; 113 R. R. 784; *Wallis* v. *Smith*, 21 C. D. 249; 52 L. J. Ch. 145; *Willson* v. *Love*, (1896) 1 Q. B. 626; 65 L. J. Q. B. 434; *Clydebank Shipbuilding Co.* v. *Don José Castaneda*, (1905) A. C. 9; 74 L. J. P. C. 1; *Pye* v. *British Automobile Commercial Syndicate*, (1906) 1 K. B. pp. 425, 431; 75 L. J. K. B. 270; *Diestal* v. *Stevenson*, (1906) 2 K. B. pp. 349, 350; 75 L. J. K. B. 797; *Public Works Commissioners* v. *Hill*, (1906) A. C. 375, 376; 75 L. J. P. C. 6; *Webster* v. *Bosanquet*, (1912) A. C. 394; 81 L. J. P. C. 205.

(*u*) *Howard* v. *Woodward*, 34 L. J. Ch. 47; *Magee* v. *Lovell*, L. R. 9 C. P. 114; 43 L. J. C. P. 131; *Clydebank Shipbuilding Co.* v. *Don José Castaneda*; *Pye* v. *British Automobile Commercial Syndicate*, supra.

(*x*) *Kemble* v. *Farren*, 6 Bing. 141; 7 L. J. C. P. 258; 31 R. R. 366; *Jones* v. *Green*, 3 Y. & J. p. 304; *Gerrard* v. *O'Reilly*, 3 Dr. & War. 430; 61 R. R. 97; *Sainter* v. *Ferguson*, 7 C. B. p. 728; 18 L. J. C. P. 21; 78 R. R. 804; *Ranger* v. *Great Western Railway Co.*, 5 H. L. 119; 101 R. R. 46; *Carnes* v. *Nesbitt*, 7 H. & N. 778; *Lea* v. *Whitaker*, L. R. 8 C. P. 73; 2 L. T. 676; *Elphinstone* v. *Monklan Iron Co.*, 11 A. C. 345; *In re White & Arthur*, 84 L. T. 594; 5 W. R. 81; *Clydebank Shipbuildin Co.* v. *Don José Castaneda*, (190 A. C. p. 9; 74 L. J. P. C. 1; *Diest* v. *Stevenson*, (1906) 2 K. B. 34 350; 75 L. J. K. B. 797

whatever the expression used in the contract in describing the payment, the question must always be whether the construction contended for renders the agreement unconscionable and extravagant and one which the Court ought not to enforce (*y*).

Where the payment of a smaller sum is secured by a larger (*z*), or where the damages to arise from the breach are not uncertain, but are capable of being ascertained, as where there is a particular sum to be paid which is less than the sum named as payable upon breach, the presumption is that the last-named sum is a penalty (*a*). So, also, where an agreement contains several stipulations of various degrees of importance, the breach of all or any of which gives rise to an amount of damage which may be accurately measured, and a disproportionate sum is annexed as payable generally upon breach of all or any of the stipulations, the presumption is that the latter sum is a penalty and not liquidated damages (*b*), and the fact that the sum payable upon breach was deposited at the making of the contract does not compel the Court to treat it as liquidated damages, although it is a circumstance which must be taken into account in ascertaining the intention of the parties (*c*). So also where one lump sum is made payable by way of compensation on the occur-

Where construed as a penalty.

(*y*) *Clydebank Engineering Co.* v. *Don José Castaneda*, (1905) A. C. at p. 10; 74 L. J. P. C. p. 3; *Public Works Commissioners* v. *Hill*, (1906) A. C. pp. 375, 376; 75 L. J. P. C. pp. 71, 72; *Webster* v. *Bosanquet*, (1912) A. C. p. 398; 81 L. J. P. C. 205.

(*z*) *Astley* v. *Weldon*, 2 Bos. & P. 346; 5 R. R. 618; *Elphinstone* v. *Monkland Iron Co.*, 11 A. C. p. 347.

(*a*) *Reynolds* v. *Bridge*, 6 E. & B. 541; *Elphinstone* v. *Monkland Iron Co.*, 11 A. C. p. 332; *Clydebank Engineering Co.* v. *Don José Castaneda*, (1905) A. C. p. 16; 75 L. J. P. C. 1; *Pye* v. *British Automobile Commercial Syndicate*, (1906) 1 K. B. 425; 75 L. J. K. B. 270; *Diestal* v. *Stevenson*, (1906) 2 K. B. p. 350; 75 L. J. K. B. 797.

(*b*) *Kemble* v. *Farren*, 6 Bing. 141; 7 L. J. C. P. 258; 31 R. R. 366; *Horner* v. *Flintoff*, 9 M. & W. p. 680; 11 L. J. Ex. 276; 60 R. R. 866; *Reynolds* v. *Bridge*, 6 E. & B. 541; 25 L. J. Q. B. 12; 106 R. R. 702; *Dimech* v. *Corlett*, 12 Moo. P. C. 229; 124 R. R. 26; *Magee* v. *Lavell*, L. R. 9 C. P. 111; 43 L. J. C. P. 131; *Elphinstone* v. *Monkland* [illegible], 11 A. C. 342, 345; *Willson* v. *Love*, (1896) 1 Q. B. p. 631; 65 L. J. Q. B. 434; *Clydebank Engineering Co.* v. *Don José Castaneda*, (1905) A. C. p. 15; 74 L. J. P. C. 1; *Pye* v. *British Automobile Commercial Co.*, (1906) 1 K. B. 425, 429; 75 L. J. K. B. 270.

rence of any one of several events some of which may occasion serious and others trifling damage, the presumption is that the parties intended the sum to be penal (*d*).

Where construed as liquidated damages.

Where, however, the payments stipulated are made proportionate to the extent to which the contractors may fail to fulfil their obligations, and they are to bear interest from the date of the failure, payments so adjusted with reference to the actual damage are *primâ facie* liquidated damages (*e*). So also if a contract consisting of one or more stipulations provides for the payment of a specified sum by way of compensation in case of the non-performance of all or of any of the things stipulated to be done, and the damages in each case of non-performance are in their nature altogether indefinite and uncertain, the sum named, if reasonable, will be regarded as liquidated damages, and not as a penalty (*f*).

Increased rent.

The fact that a sum named in a lease as payable upon breach of the covenants therein contained, may greatly exceed the actual damage, does not render the sum so reserved a penalty. It may be an increased rent agreed upon between the parties to be paid during the rest of the term. Thus where the agreement was that the defendant should not plough up any part of the land, and that if he did plough up any part of it he should pay at the rate of 20*s.* per acre per annum, the Court held that the parties had fixed a price for the ploughing, and refused an injunction (*g*).

So also where a certain sum was reserved, and the lessee covenanted that, in case any part of the land which had been in tillage for the last twenty years should be broken up, he would pay the further sum of 5*l.* per annum for every acre so broken up over the rent reserved and upon the same days of payment, the Court held this a case of liquidated damages

(*c*) *Dye* v. *British Automobile Commercial Co.*, *supra.*

(*d*) *Elphinstone* v. *Monkland Iron Co.*; *Willson* v. *Love*; *Diestal* v. *Stevenson*; *Clydebank Engineering Co.* v. *Don José Castaneda*, *supra.*

(*e*) *Elphinstone* v. *Monkland Iron Co.*, 11 A. C. p. 332.

(*f*) See *Wallis* v. *Smith*, 21 C. D. 249; 52 L. J. Ch. 145; *Law* v. *Redditch Local Board*, (1892) 1 Q. B. 127; 61 L. J. Q. B. 172; *Clydebank Engineering Co.* v. *Don José Castaneda*, (1905) A. C. p. 11; 74 L. J. P. C. 1; *Webster* v. *Bosanquet*, (1912) A. C. p. 397; 81 L. J. P. C. 205.

(*g*) *Bl[illegible]ard* v. *Eagles*, 2 Ver.

fixed and agreed upon between the parties (*h*). So also the reservation of an additional sum of 50*l*. for every acre of meadow land which should be ploughed up or converted into tillage was held to be liquidated damages (*i*). So also in a case where there was a covenant against erecting a weir under double the yearly rent hereinafter reserved, to be recovered by distress, the sum so reserved was held to be liquidated damages notwithstanding it was called a penalty in the instrument. The power of distress reserved in an instrument is strong evidence that the sum reserved is liquidated damages (*k*).

Agricultural Holdings Act, 1908.

The Agricultural Holdings Act, 1908 (*l*), provides that notwithstanding any provision to the contrary making the tenant of a holding (*m*) liable to pay or other liquidated damages, in the event of any breach or non-fulfilment of any term or condition of the contract, a landlord shall not be entitled to recover by distress or otherwise, any sum in excess of the damage actually sustained by him in consequence of the breach or non-fulfilment, but this section does not apply to any term or condition in a contract against the breaking up of pasture land, or the grubbing of underwoods, or the felling, lopping, or injuring of trees, or regulating of husbandry.

Covenant of a continuing nature.

Where a covenant is of a continuing nature, a sum reserved as payable on breach will be regarded as a penalty and not as liquidated damages. Thus where a lessee had covenanted not to burn the demised premises, part of which was meadow, under the penalty of 10*l*. per acre to be reserved rent for every acre so burned, Lord St. Leonards from burning part

v. M... Dr. & ... P...

Pet... ...C.

...nd *French* ...*ale*, 2 Dr. & War. 277; 59 R. R. 675; *Kinstone* v. *Monkland Iron Co.*, 1 A. C. p. 317.

(*i*) *Farrant* v. *Olmius*, 3 B. & ... 692.

(*k*) *Gerrard* v. *O'Reilly*, 3 Dr. & War. 414, 430; 61 R. R. 97.

(*l*) 8 Edw. 7, c. 28, s. 25.

(*m*) *I.e.*, a tenancy either wholly agricultural or wholly pastural, or in part agricultural and in part pastural, or in whole or in part cultivated as a market garden, and which is not let to the tenant during

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of the premises (*n*). So also where the covenant is an absolute one and cannot be construed as meaning that a lessee shall have power to do a certain act on payment of an additional rent, the lessee will be restrained from doing the particular act complained of (*o*).

Injunctions not granted when liquidated damages are taken. Election.

After a Court of law has determined that the word "penalty" in an agreement not to do a certain act under a certain penalty means liquidated damages, a man cannot come to the Court for an injunction to restrain the further breach of the agreement after obtaining damages at law: the fact that owing to the bankruptcy of the defendant after judgment in the action the plaintiff has not recovered the sum stipulated by way of damages does not give him any equity to an injunction (*p*). So also where a man had commenced an action to recover a penalty as and for liquidated damages for the breach of an agreement on the part of the defendant not to practise as a surgeon within a certain district, it was held that he was not entitled to an injunction also to restrain him from so practising (*q*). The plaintiff is bound in such a case to elect between the two remedies (*r*). But where a defendant covenanted with the plaintiff not to come within a certain radius of the plaintiff's house, and paid to trustees a sum of money to be held upon trust for the plaintiff absolutely in the event of a breach of the covenant, the plaintiff was held entitled on the defendant's breach to receive the money and to have an injunction restraining future breaches (*s*). If a

his continuance in any office, appointment, or employment held under the landlord, *Ib.* s. 48 (1).

(*n*) *French* v. *Macale*, 2 Dr. & War. 274; 59 R. R. 675; *Willson* v. *Love*, (1896) 1 Q. B. 626; 65 L. J. Q. B. 474.

(*o*) *Weston* v. *Metropolitan Asylum District*, 9 Q. B. D. 404; 51 L. J. Q. B. 399; *Hanbury* v. *Cundy*, 58 L. T. 155.

(*p*) *Sainter* v. *Ferguson*, 1 Mac. & G. 286; 19 L. J. Ch. 170; 84 R. R. 57; *General Accident Assurance Corporation* v. *Noel*, (1902) 1 K. B. 377; 71 L. J. K. B. 236; see *Stiles* v. *Ecclestone*, (1903) 1 K. B. p. 546; 72 L. J. K. B. p. 257; cf. *Upton* v. *Henderson*, (1912) 106 L. T. 843.

(*q*) *Carnes* v. *Nesbitt*, 7 H. & N. 778; 31 L. J. Ex. 273; 126 R. R. 669.

(*r*) *General Accident Assurance Corporation* v. *Noel*, (1902) 1 K. B. 377; 71 L. J. K. B. 236; *Stiles* v. *Ecclestone*, (1903) 1 K. B. p. 546; 72 L. J. K. B. p. 257.

(*s*) *Upton* v. *Henderson*, (1912) 106 L. T. 839.

man after obtaining an injunction brings an action for damages, the defendant may come to the Court and have the injunction dissolved (*t*).

Agreement not to apply to Parliament.

The Court has jurisdiction on a proper case being made out to restrain parties from violating an agreement not to apply to Parliament. In exercising the jurisdiction, the Court, as in other cases when it interposes by way of injunction, acts merely upon the person and does not in any way interfere with the privileges of Parliament (*u*), it simply says that it is not competent for a given party to apply to Parliament (*x*). What is a proper case for the interference of the Court is a question of much difficulty. The fact that the intended application to Parliament will abrogate existing rights and create new ones can give no right to an injunction, for every man has a right to apply to Parliament for a special law to supersede the rules of property by which he is bound (*y*). Nor will the Court interfere, even when an agreement not to apply to Parliament has been entered into for the purpose of protecting private interests, if the party who makes the application to the legislature can urge it upon grounds of public policy, for such questions are subjects for the discussion of the legislature and are beyond the province of a Court of equity (*z*). The only case in which the Court will interfere is where the matter complained of is connected solely with private property (*a*). But though the Court has, by virtue of its jurisdiction *in personam*, the power to restain an improper application to Parliament for a private Act, it is difficult to conceive a case in which it would be right for the Court to

(*t*) *Fox* v. *Scard*, 33 Beav. 329.

(*u*) *Heathcote* v. *North Staffordshire Railway Co.*, 2 Mac. & G. p. 109; 86 R. R. 25.

(*x*) *Lancaster and Carlisle Railway Co.* v. *North Western Railway Co.*, 2 K. & J. p. 304; 25 L. J. Ch. 223; 110 R. R. 234.

(*y*) *Ware* v. *Grand Junction Canal Co.*, 2 R. & M. 470, 183; *Heathcote* v. *North Staffordshire Railway Co.*, 2 Mac. & G. p. 109; 86 R. R. 25; *Steele* v. *Metropolitan Railway Co.*, 2 Ch. 237.

(*z*) *Lancaster and Carlisle Railway Co.* v. *North Western Railway Co.*, 2 K. & J. p. 304; 25 L. J. Ch. 223; 110 R. R. 234.

(*a*) *Lancaster and Carlisle Railway Co.* v. *North Western Railway Co.*, *supra*; *Telford* v. *Metropolitan Board of Works*, 13 Eq. p. 594; 41 L. J. Ch. 589.

exercise its power (*b*). Accordingly Lord Cottenham refused to restrain a railway company from applying to Parliament for leave to abandon a part of their railway in contravention of an agreement entered into with the plaintiff, who had withdrawn his opposition to a bill in a previous session of Parliament in consideration of the company agreeing to carry the railway in the direction which they proposed by their bill to abandon (*c*). So also Lord Hatherley refused to restrain a railway company from applying to Parliament for powers to make a new line in contravention of an agreement entered into with the plaintiff company, on the faith of which the plaintiff company had withdrawn all opposition to the bill presented by the defendant company in a previous session of Parliament (*d*). So also where on a motion with reference to a particular bridge, which was to be made over a road in a way which was supposed to be injurious to the public, the company had undertaken that nothing should be done until the hearing of the cause to interfere with the existing state of things, and notwithstanding the undertaking the company had taken the opportunity of inserting in a bill before Parliament a clause to liberate them from that undertaking entirely, and to enable them to do that which they had undertaken not to do, Lord Cottenham, though he expressed himself in the strongest terms as to the conduct of the railway company, said he saw very great difficulty in preventing an application to Parliament, and that unless a strong authority were adduced he should not assume that particular jurisdiction (*e*).

Injunction against application of trust funds in promoting or opposing Bills.

An injunction may be granted to prevent an improper application of funds, subject to any public or private trust, in

(*b*) *Steele* v. *North Metropolitan Railway Co.*, 2 Ch. 237; 36 L. J. Ch. 540; *In re London, Chatham and Dover Railway Arrangement Act*, 5 Ch. 671; 17 W. R. 946.

(*c*) *Heathcoate* v. *North Staffordshire Railway Co.*, 2 Mac. & G. 100; 85 R. R. 25.

(*d*) *Lancaster and Carlisle Railway Co.* v. *North Western Railway Co.*, 2 K. & J. 293; 25 L. J. Ch. 223; 110 R. R. 234; *In re London, Chatham and Dover Railway Arrangement Act*, L. R. 5 Ch. p. 679; 17 W. R. 946.

(*e*) *Att.-Gen.* v. *Manchester and Leeds Railway Co.*, 1 Ra. Ca. 436; 55 R. R. 820; see *Lancaster and Carlisle Railway Co.* v. *North Western Railway Co.*, 2 K. & J. p. 304; 25 L. J. Ch. 223; 110 R. R. 234; and *In re London, Chatham*

promoting or opposing a bill in Parliament (*f*). A municipal corporation, however, will not be restrained from defraying out of its funds the expense of resisting an attack made by a bill in Parliament against its property, rights, or privileges (*g*).

Covenant not to oppose a Bill in Parliament.

Whether a Court of equity will interfere to restrain parties from violating a covenant not to oppose a Bill in Parliament is doubtful (*h*). But in a case where the Bill would, if passed into an Act, have had the effect of depriving a minority of the shareholders of a railway company of the protection of the Wharncliffe order, the Court would not enforce a covenant not to oppose it (*i*).

Importation of a negative quality into an affirmative agreement.

The mode in which contracts or covenants, when affirmative in form, are, as a general rule, enforced by Courts of equity is by decree for specific performance. But contracts and covenants, though affirmative in form, may often involve a negative in substance. When the importation of a negative quality into an affirmative agreement is not against the meaning of the agreement, the Court will import the negative quality and restrain the doing of acts which are inconsistent with the agreement (*k*). Thus where A. agrees to give B. a first refusal of property, this involves a negative contract, and A. will be restrained from parting with the property to any

and Dover Railway Arrangement Act, supra.

(*f*) *Att.-Gen.* v. *Norwich Corporation*, 16 Sim. 225; 21 L. J. Ch. 139; 80 R. R. 56; *Att.-Gen.* v. *Mayor of Wigan*, 5 De G. M. & G. 52; 23 L. J. Ch. 429; 104 R. R. 22; *Leith Council* v. *Leith Harbour and Docks Commissioners*, (1899) A. C. 508, 516; 68 L. J. P. C. 109; *Brooks, Jenkins* v. *Torquay Corporation*, (1902) 1 K. B. p. 639; 71 L. J. K. B. 109; see *Att.-Gen.* v. *Rickmansworth U. D. C.*, (1902) 86 L. T. 521; 18 T. L. R. 482; *Att.-Gen.* v. *York* [illegible] *R.*) *Rivers Board*, (1905) 6. [illegible]. 177; and the Municipal Corporations (Borough Funds) Acts, 35 & 36 Vict. c. 91, s. 4, and 3 Edw. 7, c. 14, ss. 1 7 (i.), as to expenses of promoting and opposing Bills.

(*g*) *Att.-Gen.* v. *Brecon Corporation*, 10 C. D. 204; 48 L. J. Ch. 153; *Att.-Gen.* v. *Swansea Corporation*, (1898) 1 Ch. 606; 67 L. J. Ch. 356; see *Att.-Gen.* v. *Thomson*, (1913) 3 K. B. p. 208.

(*h*) *Parker* v. *Dunn Navigation Co.*, 1 De G. & Sm. 192.

(*i*) *Maunsell* v. *Midland, Great Western Railway Co.*, 1 H. & M. p. 162; 32 L. J. Ch. 513.

(*k*) *Lumley* v. *Wagner*, 1 De G. M. & G. 604; 21 L. J. Ch. 898; 91 R. R. 193; *De Mattos* v. *Gibson*, 4 De G. & J. 299; 28 L. J. Ch. 498; 124 R. R. 250.

one else without giving to B. the "first refusal" at a reasonable price (*l*). So also where a person agreed to take the whole of the electric energy required for his premises from a company, it was held that there was an implied contract not to take electric energy for his premises from any one else (*m*). So also a covenant by a purchaser that he would, before commencing to erect any building, submit plans thereof for the approval of the vendor was held to involve a negative covenant that no building should be commenced until plans had been submitted to and approved by the vendor (*n*). In like manner a man, who, in a demise of land, has entered into a covenant for quiet enjoyment will be restrained from doing acts in violation of his covenant (*o*). So also a man who has covenanted to carry on a certain business will be restrained from doing or causing anything to be done which would put it out of his power to carry on the business (*p*). So also a lessor who has entered into a direct, specific and express covenant with a lessee to perform all the covenants in the superior lease under which he holds, may not by any surrender of such lease derogate from the rights which his lessee has acquired from him under the lease, and he will be restrained by injunction from acting in violation of the covenants under which he became bound to such lessee (*q*). So also where a vendor makes a representation that property is subject to certain covenants affecting it permanently, and he does so in order to induce a person to buy part of such pro-

(*l*) *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, (1901) 2 Ch. 37; 70 L. J. Ch. 468. Cf. *Ryan* v. *Thomas*, (1911) 55 S. J. 364, where an agreement to give the "first option" of purchasing property was held void for uncertainty.

(*m*) *Metropolitan Electric Supply Co.* v. *Ginder*, (1901) 2 Ch. 799; 70 L. J. Ch. 862.

(*n*) *Powell* v. *Hensley*, (1909) 1 Ch. 680; 78 L. J. Ch. 337; affirmed on other points, (1909) 2 Ch. 282; 78 L. J. Ch. 741.

(*o*) *Tipping* v. *Eckersley*, 2 K. & J. p. 270. A substantial physical interference with the employment of the demised premises is a breach of the covenant. *Tebb* v. *Cave*, (1900) 1 Ch. 642; 69 L. J. Ch. 282; *Browne* v. *Flower*, (1911) 1 Ch. 219, 228; 80 L. J. Ch. 181. Cf. *Davis* v. *Town Properties Corporation*, (1903) 1 Ch. p. 804; 72 L. J. Ch. 389.

(*p*) *Hooper* v. *Brodrick*, 11 Sim. 47; 9 L. J. Ch. 321; 54 R. R. 326. See *Lazarus* v. *Cairns Steamship Co.*, (1912) 106 L. T. 278.

(*q*) *Piggott* v. *Stratton*, 1 De G. F. & J. 33; 29 L. J. Ch. 1; 125 R. R. 336.

perty, and the person buys part of the property on the faith of such representation, the vendor will be restrained by injunction from doing anything to prevent the property from continuing to be what he has represented it to be (*r*).

Implication of negative covenants.

So also railway companies have been restrained from entering into agreements which are in violation of or are inconsistent with a subsisting agreement (*s*). So also a railway company which had granted to two persons the sole and exclusive privilege of selling books at their stations was restrained by injunction from evicting them from the bookstalls at the stations (*t*). So also where the owners of a public building had contracted with a man that he, renting a stall from them, should have the exclusive right to exhibit and sell certain specified classes of goods, they were restrained by injunction from permitting the exhibition and sale by other renters of stalls within the building of goods so specified (*u*). So also a railway company which had agreed to work the line of the plaintiff railway company, and during the continuance of the agreement to develop and accommodate the local and through traffic thereon, and to carry over it certain traffic particularly specified, was restrained by injunction from carrying over other lines belonging to them traffic which ought to have passed over the plaintiffs' line (*x*). So also where a sewage company had entered into an agreement with a Local Board of Health, and had covenanted to keep the outfall of the works with the engines, &c., in proper working order, so as to admit of the free flow of the sewage through the sewers, they were restrained from permitting the sewage to remain in the sewers, so as to be a nuisance to the plaintiffs, and from

(*r*) *Spicer* v. *Martin*, 14 A. C. 12; 58 L. J. Ch. 309. Cf. *Whitehouse* v. *Hugh*, (1906) 1 Ch. 253; 75 L. J. Ch. 156; affirmed, (1906) 2 Ch. 283, 286; 75 L. J. Ch. 677.

(*s*) *Shrewsbury and Chester Railway Co.* v. *Shrewsbury and Birmingham Railway Co.*, 1 Sim. N. S. 410; 20 L. J. Ch. 574; 89 R. R. 143; *Great Western Railway Co.* v. *Birmingham and Oxford Junction Railway Co.*, 2 Ph. 597; 17 L. J. Ch. 243; 78 R. R. 209.

(*t*) *Holmes* v. *Eastern Counties Railway Co.*, 3 K. & J. 675.

(*u*) *Altman* v. *Royal Aquarium Society*, 3 C. D. 228.

(*x*) *Wolverhampton and Walsall Railway Co.* v. *London and North Western Railway Co.*, 16 Eq. 433; 43 L. J. Ch. 131.

damming up and heading back the sewage in the sewers (*y*). So also the Metropolitan Board of Works were restrained from promoting a scheme which was inconsistent with a stipulation which they had entered into with the plaintiff. It was held also that the plaintiff's right under the stipulation to sue in equity was not affected by the circumstance that the scheme in order to become operative must be submitted to Parliament (*z*). So also where a plan has been approved between parties for the erection of a building, one of them will be restrained from afterwards interfering with the mode of building approved (*a*). So also a Local Board was restrained from enforcing a rate in violation of an agreement which they had entered into with the plaintiff (*b*). So also where a husband has stipulated by deed that a child shall be under the sole care and protection of his wife, the Court will, if it can be shown that the control of the father would be injurious to the child, restrain him from removing or prosecuting any proceedings to obtain the child from the custody of his wife or from interfering with her in the management, care and protection of the child (*c*).

Negative quality not imported into an agreement which cannot from its nature be specifically enforced.

But if an agreement affirmative in form is of such a nature that it cannot be specifically enforced, and the application for an injunction is in effect and spirit an application for a decree for specific performance, the Court will not import a negative quality into the agreement, but will leave the plaintiff to his remedy by damages (*d*). The Court will not enforce a cove-

(*y*) *Nuneaton Local Board* v. *General Sewage Co.*, 20 Eq. 127 ; 44 L. J. Ch. 561.

(*z*) *Telford* v. *Metropolitan Board of Works*, 13 Eq. 574 ; 41 L. J. Ch. 589.

(*a*) *Slee* v. *Corporation of Bradford*, 4 Giff. 262.

(*b*) *Ashworth* v. *Hebden, &c., Local Board*, 47 L. J. Ch. 195.

(*c*) *Swift* v. *Swift*, 34 Beav. 266 ; 4 De G. J. & S. 710 ; 34 L. J. Ch. 391 ; *Hamilton* v. *Hector*, 13 Eq. 511 ; 6 Ch. 701 ; 40 L. J. Ch. 692 ; cf. *Vansittart* v. *Vansittart*, 2 De G. & J. 249 ; 27 L. J. Ch. 289 ; and see the Custody of Infants Act, 1873, 36 Vict. c. 12, s. 2.

(*d*) *Lumley* v. *Wagner*, 1 De G. M. & G. 622 ; 21 L. J. Ch. 898 ; *Peto* v. *Brighton, Uckfield, and Tunbridge Wells Railway Co.*, 1 H. & M. 468 ; 32 L. J. Ch. 677 ; *Merchants' Trading Co.* v. *Banner*, 12 Eq. p. 23 ; 40 L. J. Ch. 515 ; *Warne* v. *Routledge*, 18 Eq. 497 ; 43 L. J. Ch. 604 ; *Whitwood Chemical Co.* v. *Hardman*, (1891) 2 Ch. 416 ; 60 L. J. Ch. 128 ; *Ryan* v. *Mutual Tontine Westminster Chambers Association*, (1893) 1 Ch.

nant where to do so would require supervision which the Court could not undertake. Thus the Court refused to enforce a covenant by a landlord to appoint a resident porter to a building let in flats (*e*). So also where the defendant had agreed to take notes of cases in Court, and compose reports for the plaintiff, and had failed to do so, Lord Eldon refused to restrain him from making reports for other persons (*f*). So also where a grant had been made to the plaintiff of an office involving duties of a personal and confidential character, the Court refused to restrain the defendant from employing any other person than the plaintiff in the office, as the case was one where, from its very nature, specific performance could not be decreed (*g*). So also where the defendant had agreed to devote all his activity to the sale of the plaintiff's goods for a period of five years, the Court refused to restrain him from entering into another firm's employment before the expiration of the five years (*h*). So also where the plaintiff had contracted with a railway company for a stipulated sum to work the line of the railway, and to keep the engines and rolling stock in repair, the Court, upon the ground that the agreement was one which from its very nature could not be specifically enforced, refused to restrain the company from employing any other person than the plaintiff in the duties for which he had been engaged (*i*). So also where a company had engaged to employ the plaintiff as a broker for engaging freights, effecting charter-parties, &c., and it was stipulated

116; 62 L. J. Ch. 252; *Davis* v. *Foreman*, (1894) 3 Ch. 654; 64 L. J. Ch. 187; *Kirchner* v. *Gruban*, (1909) 1 Ch. 413; 78 L. J. Ch. 117; cf. *Crisp* v. *Holden*, (1910) 54 S. J. 784, where an interlocutory injunction was granted restraining the managers of a non-provided public elementary school from dismissing their headmaster.

(*e*) *Ryan* v. *Mutual Tontine Westminster Chambers Association*, (1893) 1 Ch. 116; 62 L. J. Ch. 252.

(*f*) *Clarke* v. *Price*, 2 Wils. C. C. 157; 18 R. R. 159.

(*g*) *Pickering* v. *Bishop of Ely*, 2 Y. & C. C. C. 249; 12 L. J. Ch. 271; 60 R. R. 132; *Millican* v. *Sullivan*, 4 T. L. R. 204; *Firth* v. *Ridley*, 33 Beav. 516; *Ogden* v. *Fossick*, 4 De G. F. & J. 426; 32 L. J. Ch. 73; *Frith* v. *Frith*, (1906) A. C. 254; 75 L. J. P. C. 50.

(*h*) *Kirchner* v. *Gruban*, (1909) 1 Ch. 413; 78 L. J. Ch. 117.

(*i*) *Johnson* v. *Shrewsbury and Birmingham Railway Co.*, 3 De G. M. & G. 914; 22 L. J. Ch. 921.

that his name should appear jointly with that of the secretary in all the advertisements of the company, the Court would not restrain the company from issuing any advertisement, unless the name of the plaintiff was therein inserted (*k*).

So also the Court would not restrain the directors of a company from acting upon and enforcing the resignation of an agent (*l*). So also where an indenture was held to constitute the relation of master and servant and not that of partner, Lord Truro dissolved an injunction which had been granted restraining the defendant from excluding the plaintiff from the management of the business (*m*). So also the Court will not as a rule restrain by injunction the breach of a contract for the sale and delivery of chattels (*n*). Nor will the Court enforce by mandatory injunction the performance of covenants in a lease as to the cultivation of land (*o*), or the working of a mine (*p*). Nor will the Court enforce by mandatory injunction the execution of repairs to a highway (*q*). Nor will the Court restrain by injunction a threatened breach by a tenant of a stipulation in a farming agreement requiring him to keep on the farm a proper and sufficient stock of sheep, horses and cattle (*r*). So also in a case where there was a proviso in the lease of a mine that the lessor might at the end of the term purchase the machinery in the mine at a certain

When an injunction will not be granted.

(*k*) *Brett* v. *East India and London Shipping Co.*, 2 H. & M. 404; 12 W. R. 596.

(*l*) *Mair* v. *Himalaya Tea Co.*, 1 Eq. 411; 13 L. T. 586.

(*m*) *Stocker* v. *Brocklebank*, 3 Mac. & G. p. 267; 20 L. J. Ch. 401; 87 R. R. 87.

(*n*) *Fothergill* v. *Rowland*, 17 Eq. 132; 43 L. J. Ch. 252; *Metropolitan Electric Supply Co.* v. *Ginder*, (1901) 2 Ch. p. 808; 70 L. J. Ch. 862; *Dominion Coal Co.* v. *Dominion Iron and Steel Co.*, (1909) A. C. 293; 78 L. J. P. C. 115. But see *Donnell* v. *Bennett*, 22 C. D. 837; 52 L. J. Ch. 414; and see also the Sale of Goods Act, 1893, 56 & 57 Vict. c. 73, s. 52.

(*o*) *Musgrave* v. *Horner*, 31 L. T. 632; 23 W. R. 125. As to farming leases, see the Agricultural Holdings Act, 1908, 8 Edw. 7, c. 28, ss. 26, 46, 48 (1).

(*p*) *Wheatley* v. *Westminster Brymbo Coal Co.*, 9 Eq. 538; 39 L. J. Ch. 175; *Moore* v. *Ullcoats Mining Co.*, (1908) 1 Ch. p. 585; 77 L. J. Ch. 282.

(*q*) *Att.-Gen.* v. *Staffordshire County Council*, (1905) 1 Ch. p. 342; 74 L. J. Ch. 153; see *Reynolds* v. *Barnes*, (1909) 2 Ch. p. 372; 78 L. J. Ch. 647.

(*r*) *Phipps* v. *Jackson*, 56 L. J. Ch. 550; 35 W. R. 378.

valuation to be made by arbitrators, one of them to be nominated by the lessee, the Court would not restrain the lessee from removing the machinery at the end of the term, as it could not compel him to name an arbitrator (*s*). Nor, where the stipulations sought to be enforced are subsidiary to the whole agreement will a negative be imported so as, to be a foundation for an injunction, unless the whole agreement is capable of being specifically enforced (*t*).

Negative quality may be imported where some of the stipulations are distinct and separate from the rest of the agreement.

But though the agreement may be one which cannot from its very nature be specifically enforced as a whole, the Court will, where parts of the agreement are distinct and separable from the rest, import a negative and interfere by way of injunction (*u*). Where, therefore, a railway company had granted to certain lessees a licence to publish advertisements in the company's carriages, and the sole licence of selling books, &c., at their stations, the Court restrained the company from removing the advertisements and from evicting the plaintiffs from their bookstalls, though there were other parts of the agreement which the Court could not specifically enforce (*x*). So also where on the sale and purchase of land the purchaser covenanted with the vendor, a brewer, that he should have the exclusive right of supplying all ale, beer and porter which should be consumed in any building which should be erected on this particular piece of land, the Court restrained the defendant who took under the purchaser from acting in contravention of the covenant, in spite of the fact that in the conveyance to the original purchaser the vendor did not covenant to supply any ale, beer or porter (*y*).

(*s*) *Hamilton* v. *Dunsford*, 6 Ir. Ch. 412, and see *Darbey* v. *Whitaker*, 4 Drew. 134.

(*t*) *Paris Chocolate Co.* v. *Crystal Palace Co.*, 3 Sm. & G. 119; *Scottish North Eastern Railway Co.* v. *Stewart*, 3 Macq. 382; 7 W. R. 458.

(*u*) *Holmes* v. *Eastern Counties Railway Co.*, 3 K. & J. 675; and see *Ogden* v. *Fossick*, 4 De G. F. & J. 426; 32 L. J. Ch. 73; *Frith* v. *Frith*, (1906) A. C. 254; 75 L. J. P. C. 50, where specific performance was refused, the two parts of the agreement being inseparably connected.

(*x*) *Holmes* v. *Eastern Counties Railway Co.*, *supra*.

(*y*) *Catt* v. *Tourle*, 4 Ch. 654; 38 L. J. Ch. 655. As to form of order, see *Courage & Co.* v. *Carpenter*, (1910) 1 Ch. 262, 269; 79 L. J. Ch. 184. The injunction will continue

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So also where the plaintiffs had contracted to purchase the timber on the defendant's estates, with the express right to enter upon the estates to cut and remove the timber, and the defendant repudiated the contract and forcibly ejected the plaintiffs, the Court restrained the defendant revoking the licence to enter conferred upon the plaintiffs by the contract, although the Court would not have compelled the plaintiffs to cut and remove the timber if they had refused to do so (*z*).

Negative quality imported into a charter-party.

The contract of charter-party is, from the peculiar nature of the subject of the contract, an exception to the rule that a negative quality will not be imported into an affirmative agreement, unless the agreement is of such a nature that a decree for specific performance can be made. "I think," said Lord Chelmsford, "that a vessel under a charter-party ought to be regarded as a chattel of peculiar value to the charterer, and that although a Court of equity cannot compel a specific performance of the contract which it contains, yet that it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly forbidden according to the principle expressed in *Lumley* v. *Wagner* (*a*). If a charter-party is *bonâ fide* entered into between the owner of a vessel and the charterer, either party is entitled to an injunction to restrain the other from doing anything inconsistent with the agreement (*b*).

Negative quality not imported into an agreement, unless the party who seeks the aid of the Court has performed his own part of it.

If the agreement consists of two or more stipulations, and is one which cannot from its very nature be specifically enforced as a whole, the Court will not import a negative quality into the agreement so as to be a foundation for an injunction,

so long as the brewer supplies beer of reasonable quality and at a reasonable price.

(*z*) *Jones & Co.* v. *Tankerville* (*Earl*), (1909) 2 Ch. 440; 78 L. J. Ch. 674.

(*a*) *De Mattos* v. *Gibson*, 4 De G. & J. 276, 298; 28 L. J. Ch. 498. See this case discussed in *Whitwood Chemical Co.* v. *Hardman*, (1891) 2 Ch. 416, 431; 60 L. J. Ch. 428.

(*b*) *Sevin* v. *Deslandes*, 30 L. J. Ch. 457; *Messageries Impériales* v. *Baines*, 11 W. R. 322; *Heriot* v. *Nicholas*, 12 W. R. 844; *Le Blanch* v. *Granger*, 35 Beav. 187; *Herne Bay Steamboat Co.* v. *Hutton* (1903) 2 K. B. p. 692; 72 L. J. K. B. 879; and see *Bucknall* v. *Tatem*, (1900) 83 L. T. 121, where the charterers had so acted as to disentitle themselves to an injunction.

unless the person who makes the application has actually performed his own part of the agreement (*c*). The mere assertion on his part that it is his intention to perform his part of the agreement is not sufficient, unless the Court can decree specific performance against him (*d*). Thus where an agreement had been entered into between a railway company and a contractor, whereby the contractor agreed to complete the line of railway, and the company agreed to pay him in shares and debentures as the works progressed, but the company repudiated the contract, the Court refused to restrain the company from dealing with the debentures and shares in a manner inconsistent with the agreement, on the ground that it was beyond the power of the Court to make him perform his part of the contract (*e*). So also where the manager of a London theatre engaged for a period of two years a provincial actor, who was desirous of appearing on a London stage. Though there was nothing express on the subject, the Court implied an engagement on the part of the manager not merely to pay the agreed salary but to give the actor the opportunity of appearing on the stage, and an engagement on the part of the actor not to perform elsewhere. The manager having delayed the appearance of the actor for five months, the Court considered that his conduct was in spirit a breach of the engagement, and would not restrain the actor from acting elsewhere (*f*).

Agreement containing both affirmative and negative stipulations.

Where an affirmative covenant has a negative element in it, or where a covenant is partly affirmative and partly negative, the Court will in a proper case enforce the negative portion of

(*c*) *Fechter* v. *Montgomery*, 33 B. 22; *Grimston* v. *Cuningham*, (1894) 1 Q. B. p. 130. See *Measures Brothers* v. *Measures*, (1910) 2 Ch. 248; 79 L. J. Ch. 707.

(*d*) *Peto* v. *Brighton, Uckfield, and Tunbridge Wells Railway Co.*, 1 H. & M. 468; 32 L. J. Ch. 677.

(*e*) *Ib.* See *Ogden* v. *Fossick*, 4 De G. F. & J. 426.

(*f*) *Fechter* v. *Montgomery*, 33 Beav. 22. See also *Turner* v. *Goldsmith*, (1891) 1 Q. B. 544; 60 L. J. Ch. 247 (payment by commission); *Devonald* v. *Rosser*, (1906) 2 K. B. 728, 731, 732; 75 L. J. K. B. 688 (payment by piecework); but see *Whitwood Chemical Co.* v. *Hardman*, (1891) 2 Ch. 416; 60 L. J. Ch. 728; *Grimston* v. *Cuningham*, (1894) 1 Q. B. 125; *Turner* v. *Sawdon*, (1901) 2 K. B. 653; 70 L. J. K. B. 897.

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the covenant (*g*); and the Court may also enforce by injunction the negative part of an agreement containing both affirmative and negative stipulations, although the affirmative part of the agreement is of such a nature that it could not be specifically enforced. Thus where the defendant had entered into an engagement with the plaintiff to sing at his theatre and not to sing at any other theatre, Lord St. Leonards restrained her from singing at any other theatre than the plaintiff's, though it was beyond all doubt that he had not the power to decree specific performance of the affirmative part of the contract (*h*). So also where a contract for the sale of chattels contained an express negative stipulation not to sell to any other person, an injunction was granted to restrain the doing of the act stipulated not to be done, although the contract was one of which specific performance would not have been granted (*i*). But the principle of *Lumley* v. *Wagner* will not be extended (*k*), and ought not to be applied to an agreement which, though negative in form, is affirmative in substance (*l*).

Conditions as to sale of goods and patented articles.

An agreement by a purchaser not to sell the vendor's goods below minimum price is valid, and can be enforced by the vendor against such purchaser (*m*), but not against subsequent purchasers even though they buy with notice of the condition, for a vendor cannot impose conditions on the re-sale of his goods so as to run with or attach to the goods (*n*).

(*g*) *Clegg* v. *Hands*, 44 C. D. 503; 59 L. J. Ch. 477.

(*h*) *Lumley* v. *Wagner*, 1 De G. M. & G. 604; 21 L. J. Ch. 898; 91 R. R. 193.

(*i*) *Donnell* v. *Bennett*, 22 C. D. 837; 52 L. J. Ch. 414; see also *Metropolitan Electric Light Co.* v. *Ginder*, (1901) 2 Ch. 799; 70 L. J. Ch. 862; and see the Sale of Goods Act, 1893, 56 & 57 Vict. c. 73, s. 52.

(*k*) *Whitwood Chemical Co.* v. *Hardman*, (1891) 2 Ch. p. 428; 60 L. J. Ch. 428; *Ehrmann* v. *Bartholomew*, (1898) 1 Ch. p. 671; 67 L. J. Ch. 319; *Kirchner* v. *Gruba* (1909) 1 Ch. p. 421; 78 L. J. Ch. 11

(*l*) *Davis* v. *Foreman*, (1894) Ch. 654; 64 L. J. Ch. 187; *Kirchn* v. *Gruban*, (1909) 1 Ch. p. 413; L. J. Ch. 117.

(*m*) *Elliman & Co.* v. *Carringt & Co.*, (1901) 2 Ch. 275; 70 L. Ch. 577; *United Shoe Machine Co. of Canada* v. *Brunet*, (190 A. C. 330, 343; 78 L. J. P. 101; *Dunlop Pneumatic Tyre* v. *Selfridge*, (1913) 29 T. L. R. 26 W. N. 46.

(*n*) *Taddy & Co.* v. *Sterious &*

But conditions can be attached by a patentee to his patented articles so as to bind all purchasers who acquire the articles with knowledge of the conditions (*o*).

Patented articles.

Sect. 38 of the Patents and Designs Act, 1907 (*p*), however, avoids, in contracts made after the passing of the Act (*q*), certain restrictive conditions attached to the sale or lease of or licence to use or work patented articles as being in restraint of trade and contrary to public policy, and further provides that any contract made before the passing of the Act containing any such restrictive condition may be determined by three months' notice in writing on paying compensation.

Enforcement by injunction of covenants restricting the user of land.

Except in cases between landlord and tenant the obligation of a covenant restricting the employment of land (and not amounting to an easement, or the grant of a rent-charge) does not run with the land at law so as to bind an assignee although assignees be expressly named in the covenant (*r*). But such a covenant, though not running with the land at law so as to give a legal remedy, and though not even purporting to bind assigns, will be enforced in equity against all subsequent owners of the land not being *bond fide* purchasers for value of the legal estate without notice, actual or constructive, of the covenant (*s*). A restrictive covenant will therefore be enforced against a purchaser who merely takes an equitable estate whether he had notice or not [illegible] against a

Run with the land in Equity.

(1904) 1 Ch. 354; 73 L. J. Ch. 191; *McGruther* v. *Pitcher*, (1904) 2 Ch. 306; 73 L. J. Ch. 653; *Badische Anilin und Soda Fabrik* v. *Isler*, (1906) 1 Ch. p. 611; 75 L. J. Ch. 749; *National Phonograph Co. of Australia* v. *Manck*, (1911) A. C. pp. 347—353; 80 L. J. P. C. 105.

(*o*) *Badische Anilin und Soda Fabrik* v. *Isler*, (1906) 1 Ch. 605; 75 L. J. Ch. 411; (1906) 2 Ch. 443; 75 L. J. Ch. 749; *National Phonograph Co. of Australia* v. *Manck*, *supra*.

(*p*) 7 Edw. 7, c. 29.

(*q*) 1st January, 1908, except where otherwise expressly provided, sect. 99.

(*r*) *Renals* v. *Cowlishaw*, 9 C. D. p. 129; S. C. on appeal, 11 C. D. 866; 48 L. J. Ch. 830; *Austerberry* v. *Corporation of Oldham*, 29 C. D. 750; 55 L. J. Ch. 633.

(*s*) *Tulk* v. *Moxhay*, 2 Ph. 774; 78 R. R. 289; *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; 51 L. J. Q. B. 73; *London and South-Western Railway Co.* v. *Gomm*, 20 C. D. p. 583; 51 L. J. Ch. 530; *In re Nisbet and Potts' Contract*, (1906) 1 Ch. p. 405; 75 L. J. Ch. 238.

(*t*) *London and South-Western*

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person who has acquired a title to the land under the Statute of Limitations against the owner and covenantor (*u*). The benefit of a restrictive covenant is in the nature of a negative easement (*x*); accordingly, when a restrictive covenant is entered into with a covenantee not in respect of or concerning any land belonging to the covenantee, or in which he is interested, as where a vendor sells the whole of his estate to the purchaser, subject to restrictive provisions, the Court will not enforce by injunction the covenant against assignees of the land of the covenantor, whether they had notice of the covenant or not (*y*). In such a case the covenant will be treated as purely personal to the covenantee (*z*).

The principle of *Tulk* v. *Moxhay* (*a*), that restrictive covenants create an equitable burden on the land in the nature of a negative easement, applies to persons taking any interest in the land, whether as tenants for years, or from year to year (*b*), or as mere occupiers (*c*).

Purchaser for value without notice.

In order that covenants not running with the land at law should be enforceable in equity, it is essential that the purchaser should not be able to set up the defence of purchase for valuable consideration without notice (*d*). Thus where the owner in fee of a square garden in London and some

Railway Co. v. *Gomm*, 20 C. D. p. 583; 51 L. J. Ch. 530; *Rogers* v. *Hosegood*, (1900) 2 Ch. p. 405; 69 L. J. Ch. 652; *In re Nisbet and Potts' Contract*, (1905) 1 Ch. pp. 397, 398; 74 L. J. Ch. 310.

(*u*) *In re Nisbet and Potts' Contract*, (1906) 1 Ch. 386; 75 L. J. Ch. 238.

(*x*) *London and South-Western Railway Co.* v. *Gomm*, *supra*; *Rogers* v. *Hosegood*, (1900) 2 Ch. 405, 467; 69 L. J. Ch. 652; *In re Nisbet and Potts' Contract*, (1906) 1 Ch. 405, 409; 75 L. J. Ch. 238.

(*y*) *Formby* v. *Barker*, (1903) 2 Ch. 539, 554; 72 L. J. Ch. 716.

(*z*) Ibid.

(*a*) 2 Ph. 774; 78 R. R. 289.

(*b*) *Wilson* v. *Hart*, 1 Ch. 463; 13 W. R. 918; *Mander* v. *Falcke*, (1891) 2 Ch. p. 557; 61 L. J. Ch. 3; *Holloway, Brothers* v. *Hill*, (1902) 2 Ch. p. 616; 71 L. J. Ch. 818; *Teape* v. *Douse*, (1905) 92 L. T. 319; 21 T. L. R. 271.

(*c*) *Mander* v. *Falcke*, (1891) 2 Ch. 554; 61 L. J. Ch. 3; *In re Nisbet and Potts' Contract*, (1905) 1 Ch. p. 397; 75 L. J. Ch. 238.

(*d*) *London and South-Western Railway Co.* v. *Gomm*, 20 C. D. 583; 51 L. J. Ch. 530; *In re Cox and Neve's Contract*, (1891) 2 Ch. 109; 64 L. T. 733; *In re Nisbet and Potts' Contract*, (1905) 1 Ch. p. 398; 74 L. J. Ch. 310; (1910) 1 Ch. p. 405; 75 L. J. Ch. 238.

houses in the square had conveyed the garden to A. in fee, and A. had covenanted for himself and assigns not to use the open space for any other purpose than as a square garden, it was held that a purchaser from A. with notice of the covenant was bound by it in equity, whether or not he was bound at law, and an injunction was granted to restrain him from building on the square garden (*e*).

So where on the sale of a building estate there was a general deed of covenant prohibiting the various purchasers from using or allowing their lots to be used for certain purposes, persons claiming, through purchasers who had been parties to the deed, having notice of the covenant, were restrained from using their lots for any of the prohibited purposes (*f*). So also, where there was a covenant by purchasers of adjoining lots not to build on the garden spaces which were specified on a general building plan, a person claiming through one of the original covenantors having notice of the covenant was restrained from throwing out a bay window into the garden at the back of his house (*g*).

Constructive notice.

Mere constructive notice will be sufficient to preclude the defence of purchase for value without notice (*h*). Thus a yearly tenant without express notice that his landlord was bound by a covenant not to use the premises as a beershop was restrained from doing so upon the ground that though

(*e*) *Tulk* v. *Moxhay*, 2 Ph. 777; 78 R. R. 289.

(*f*) *Whatman* v. *Gibson*, 9 Sim. 196; 7 L. J. (N. S.) Ch. 160; 47 R. R. 214. See *Jay* v. *Richardson*, 30 Beav. p. 568; 31 L. J. Ch. 398; *Nottingham Brick and Tile Co.* v. *Butler*, 16 Q. B. D. 778; 55 L. J. Q. B. 280; *Rogers* v. *Hosegood*, (1900) 2 Ch. p. 397; 69 L. J. Ch. 652.

(*g*) *Western* v. *McDermott*, 2 Ch. 72; 36 L. J. Ch. 76; *Manners* (*Lord*) v. *Johnson*, 1 C. D. 673; 45 L. J. Ch. 404.

(*h*) *Wilson* v. *Hart*, 1 Ch. 463, 467; 13 W. R. 988; *Patman* v. *Harland*, 17 C. D. 353; 50 L. J. Ch. 642; see *In re Cox and Neve's Contract*, (1891) 2 Ch. 109; 64 L. T. 733; *Holloway* v. *Hill*, (1902) 2 Ch. p. 620; 71 L. J. Ch. 818; *Hooper* v. *Bromet*, (1903) 89 L. T. 37; *Rowell* v. *Sachell*, (1903) 2 Ch. 212, 221; 73 L. J. Ch. 20; *Teape* v. *Douse*, (1905) 92 L. T. 319; 21 T. L. R. 271; *In re Nisbet and Potts' Contract*, (1906) 1 Ch. 386; 75 L. J. Ch. 238; *Phipps* v. *Callegari*, (1910) 54 S. J. 635; *Abbey* v. *Gutteres*, (1911) 55 S. J. 364; and see the Conveyancing Act, 1882, s. 3, and the Conveyancing Act, 1911, s. 11.

only a yearly tenant, he was as much bound to inquire into his landlord's title as if he had been the purchaser of a larger interest (*i*). So also an underlessee was held to be bound by covenants in the original lease of which he had no actual notice, on the ground that he ought to have satisfied himself as to his lessor's title (*k*). So also where a purchaser of the fee simple entered into restrictive covenants as to the user of the land and afterwards granted a lease which did not contain any similar prohibition, the lessee, though he had no actual notice of the covenant, was restrained at the suit of the original vendor from committing a breach (*l*).

Purchaser for value without notice can convey free from restrictions.

But when once there has been a purchase of land *bonâ fide* for value without notice of restrictions on its user, a good title can afterwards be made free from the restrictions even to a purchaser who has notice of them (*m*).

Restrictive covenants under building scheme, rights of purchasers.

So also where, on the sale of land, part of a larger estate, the vendor enters into restrictive covenants with the purchaser with respect to the use and occupation of the land which he retains, the Court will, as a Court of equity in favour of the successor in title of the purchaser, enforce the restrictive covenants by injunction against the successor in title of the vendor having notice of the covenants (*n*). So also where land is offered for sale in lots subject to restrictive conditions, in accordance with a building scheme (*o*), the vendor, having sold one lot, is under an obligation to the purchaser of such

(*i*) *Wilson* v. *Hart*, 1 Ch. 463; 13 W. R. 988.

(*k*) *Parker* v. *Whyte*, 1 H. & M. 167; 32 L. J. Ch. 520; *Clement* v. *Welles*, 1 Eq. 200; 35 L. J. Ch. 265; *Teape* v. *Douse*, (1905) 92 L. T. 319; 21 T. L. R. 271; *South of England Dairies Co.* v. *Baker*, (1906) 2 Ch. p. 638; 76 L. J. Ch. p. 81; *Abbey* v. *Gutteres*, (1911) 55 S. J. 364.

(*l*) *Feilden* v. *Slater*, 7 Eq. 523; 38 L. J. Ch. 379.

(*m*) *Louther* v. *Carlton*, 2 Atk. 242; *Nottingham Brick and Tile Co.* v. *Butler*, 16 Q. B. D. p. 787; 55 L. J. Q. B. 280; *Wilkes* v. *Spooner*, (1911) 2 K. B. 487, 488; 80 L. J. K. B. 1107.

(*n*) *McLean* v. *McKay*, L. R. P. C. 327; 29 L. T. 352; *Nicoll* v. *Fenning*, 19 C. D. 258; 51 L. J. Ch. 166.

(*o*) As to the essentials of a building scheme, see *Elliston* v. *Reacher*, (1908) 2 Ch. 374, 665; 77 L. J. Ch. 617; *Reid* v. *Bickerstaff*, (1909) 2 Ch. 305; 78 L. J. Ch. 753; *Willé* v. *St. John*, (1910) 1 Ch. 84, 325; 79 L. J. Ch. 239; *Sobey* v. *Sainsbury*, (1913) 2 Ch. 513; *infra*, p. 490.

lot to observe the conditions as to the lots remaining unsold in his hands, to the same extent as purchasers of the lots would be, and in such a case the vendor will be restrained from selling the unsold lots free from the restrictive covenants (*p*).

But if a man, on granting or demising land, takes a restrictive covenant from the purchaser for his own benefit and then grants or demises part of the land retained to other persons without any notice of the covenant, the benefit of the covenant does not enure to the subsequent grantee or lessee (*q*). In a case where A. sold part of an estate to B., who entered into restrictive covenants for himself, his heirs, and assigns, with A., his heirs, executors, and administrators, as to buildings on the purchased property, but A. did not enter into any covenants as to the land retained; and A. afterwards sold to other persons various parts of the lots retained, but nothing appeared as to the contents of their conveyances, nor was there any evidence that they were informed of the covenants entered into by B.; and A. afterwards bought back from B. what he had sold to him. It was held that the benefit of B.'s covenants did not in equity pass to the subsequent purchasers of other parts of the estate from A., and that A. after the re-purchase, could make a title to the re-purchased land discharged from the covenants (*r*).

So also in *Renals* v. *Cowlishaw* (*s*), the owners in fee of a residential estate and adjoining land sold part of the adjoining land to defendant's predecessors in title, who entered into

(*p*) *Mackenzie* v. *Childers*, 43 C. D. 265; 59 L. J. Ch. 188; *Rowell* v. *Satchell*, (1903) 2 Ch. p. 219; 73 L. J. Ch. 20.

(*q*) *Master* v. *Hansard*, 4 C. D. 718; 46 L. J. Ch. 505; see *In re Birmingham and District Land Co.* v. *Allday*, (1893) 1 Ch. 342; 62 L. J. Ch. 90; *Rogers* v. *Hosegood*, (1900) 2 Ch. pp. 407-408; 69 L. J. Ch. 652; *Reid* v. *Bickerstaff*, (1909) 2 Ch. pp. 320-324; 78 L. J. Ch. 753.

(*r*) *Keates* v. *Lyon*, 4 Ch. 218; 38 L. J. Ch. 357.

(*s*) 11 C. D. 866; 48 L. J. Ch. 830; and see *Nottingham Brick and Tile Co.* v. *Butler*, 15 Q. B. D. pp. 268-269; S. C. on appeal, 16 Q. B. D. 778; 55 L. J. Q. B. 280; *Spicer* v. *Martin*, 14 A. C. p. 24; 58 L. J. Ch. 309; *Rogers* v. *Hosegood*, (1900) 2 Ch. p. 408; 69 L. J. Ch. 652; *Reid* v. *Bickerstaff*, (1909) 2 Ch. pp. 320, 325; 78 L. J. Ch. 753.

covenants with the vendors, their heirs and assigns, restricting their right to build on and use the purchased land. The same vendors afterwards sold the residential estate to the plaintiffs' predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers were to have the benefit of them: it was held that the plaintiffs were not entitled to restrain the defendants from building in contravention of the restrictive covenants entered into by their predecessors in title. The principle deducible from the cases is that where a vendor sells to several persons plots of land parts of a larger property and exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor and his purchasers, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common benefit of the purchasers. If the restrictive covenants are merely for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit (*t*).

The fact that the several purchasers from the common vendor were not aware at the date of their purchases of the existence of any such covenants is strong if not conclusive evidence of an intention that the covenants were not entered into for the benefit of the purchasers *inter se*, but for the advantage of the vendor himself (*u*).

(*t*) *Nottingham Brick and Tile Co.* v. *Butler*, 15 Q. B. D. pp. 268-299; 16 Q. B. D. p. 784; 55 L. J. Q. B. 280; *Spicer* v. *Martin*, 14 A. C. 12, 24; 58 L. J. Ch. 309; *Mackenzie* v. *Childers*, 43 C. D. pp. 276-279; 59 L. J. Ch. 188; *In re Birmingham and District Land Co.* v. *Allday*, (1893) 1 Ch. 342; 62 L. J. Ch. 90; *Osborne* v. *Bradley*, (1903) 2 Ch. pp. 454-455; 73 L. J. Ch. 49; *Elliston* v. *Reacher*, (1908) 2 Ch. p. 384; S. C. on appeal, p. 665; 77 L. J. Ch. 617; *Reid* v. *Bickerstaff*, (1909) 2 Ch. 320, 325; 78 L. J. Ch. 753.

(*u*) *Keates* v. *Lyon*, 4 Ch. 218; 38 L. J. Ch. 357; *Master* v. *Han-*

Enforcement of restrictive covenants by purchasers *inter se*.

The intention that such covenants shall enure for the benefit of the various purchasers *inter se* may be either express; as, for instance, where, on the sale of a building estate in lots by the trustees of a building society each purchaser covenanted with the vendors to observe and perform certain building stipulations and the covenants were to enure to the benefit of the persons for the time being entitled under conveyances to be thereafter made by the covenantees, but the covenantees were to be deemed trustees of the covenants for the benefit of the persons claiming under any conveyances already made by the trustees, it was held that every allottee and purchaser had an equity to enforce the covenants (*x*); or the intention may be implied from the surrounding circumstances, as, for instance, where land is put up to auction in lots under conditions which define the restrictions to be placed upon and the covenants to be entered into by the various purchasers (*y*); or where land is sold either together or in lots to be built upon in accordance with a general building scheme (*z*); or where a vendor selling part of an estate covenants for himself and his assigns to place restrictions on the use of the adjoining land which he retains (*a*). The mere fact that the common vendor does not bind himself expressly to enforce the covenant which he takes for the benefit of the purchasers is not material, if the inten-

sard, 4 C. D. 718; 46 L. J. Ch. 505; *Renals* v. *Cowlishaw*, 11 C. D. 866; 48 L. J. Ch. 830; *Elliston* v. *Reacher*, (1908) 2 Ch. pp. 384, 385; S. C. on appeal, p. 665; 77 L. J. Ch. 617; *Tubbs* v. *Esser*, (1910) 26 T. L. R. p. 146.

(*x*) *Eastwood* v. *Lever*, 4 De G. J. & S. 114; 33 L. J. Ch. 355; *Jackson* v. *Winnifreth*, 47 L. T. 243.

(*y*) *Nottingham Brick and Tile Co.* v. *Butler*, 16 Q. B. D. 778; 55 L. J. Q. B. 280; *Spicer* v. *Martin*, 14 A. C. p. 25; 58 L. J. Ch. 309; *Elliston* v. *Reacher*, (1908) 2 Ch. pp. 384, 385, S. C. on appeal, p. 665; 77 L. J. Ch. 617; *Reid* v. *Bickerstaff*, (1909) 2 Ch. 319, 320; 78 L. J. Ch. 753.

(*z*) *Spicer* v. *Martin*, 14 A. C. 12, 25; 58 L. J. Ch. 309; *Elliston* v. *Reacher*, (1908) 2 Ch. 374, S. C. on appeal, p. 665; 77 L. J. Ch. 617; *Reid* v. *Bickerstaff*, (1909) 2 Ch. 305; 78 L. J. Ch. 753. As to building schemes see *infra*, p. 490.

(*a*) *Mann* v. *Stephens*, 15 Sim. 377; 74 R. R. 101; *Coles* v. *Simms*, 5 De G. M. & G. 1; 23 L. J. Ch. 258; 104 R. R. 1; *Nicoll* v. *Fenning*, 19 C. D. 258; 51 L. J. Ch. 166.

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Building schemes. *Renals* v. *Cowlishaw*; *Spicer* v. *Martin*.

tion is otherwise clear that the purchasers are to be bound *inter se* (*b*).

The principle governing the above class of cases was thus expressed by Hall, V.-C., in *Renals* v. *Cowlishaw* (*c*), which was approved by the House of Lords in *Spicer* v. *Martin* (*d*), "It may be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the Court is satisfied that it was the intention that each one of the several purchasers should be bound by and should as against the others have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is the benefit of the covenant, enures to the assigns of the first purchaser, in other words runs with the land of each purchaser. This right exists not only where the several parties execute a mutual deed of covenant but wherever a mutual contract can be sufficiently established." In a recent case (*e*) it was laid down that in order to bring the principles of *Renals* v. *Cowlishaw* and *Spicer* v. *Martin* into operation, it must be proved "(1) that both the plaintiff and the defendant derive title under a common vendor; (2) that previously to selling the lands to which the plaintiff and defendant are respectively entitled, the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiff and defendant) for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended

(*b*) *Nottingham Brick and Tile Co.* v. *Butler*, 16 Q. B. D. p. 791; 55 L. J. Q. B. 280; *Reid* v. *Bickerstaff*, (1909) 2 Ch. p. 323; 78 L. J. Ch. 753.

(*c*) 9 C. D. p. 129, S. C. on appeal, 11 C. D. 866; 48 L. J. Ch. 830.

(*d*) 14 A. C. p. 24; 58 L. J. Ch. 309.

(*e*) *Elliston* v. *Reacher*, (1908) 2 Ch. p. 384; 77 L. J. Ch. 617, per Parker, J.; and see *Reid* v. *Bickerstaff*, (1909) 2 Ch. pp. 319-323; 78 L. J. Ch. 753; *Willé* v. *St. John*, (1910) 1 Ch. p. 88; S. C. on appeal, p. 325; 79 L. J. Ch. 239.

to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiff and the defendant, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made, were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendor."

In order to establish the existence of a building scheme it is therefore essential that there should be a defined area within which the scheme is operative and that the obligations imposed upon purchasers of land within the area are defined and sufficiently disclosed. There must be between the several purchasers "community of interest and reciprocity of obligation" (*f*).

The mere fact that the vendor has reserved to himself the right to waive or vary the covenants as regards his unsold property, is not by itself sufficient to prevent the existence of a building scheme, though it is a circumstance which the Court will take into consideration in deciding whether there was or was not a scheme (*g*). Apart from any building scheme, a purchaser may be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant, or where the restrictive covenant is expressed to be for the benefit and protection of the particular parcel of land acquired by the subsequent purchaser, in which case the benefit of the covenant passes to such purchaser of the land, whether he knew of its existence or not, being in the nature of an easement attached to his land as the dominant tenement (*h*).

(*f*) *Reid* v. *Bickerstaff*, (1909) 2 Ch. pp. 319, 323; 78 L. J. Ch. 753.

(*g*) *Osborne* v. *Bradley*, (1903) 2 Ch. p. 455; *Elliston* v. *Reacher*, (1908) 2 Ch. p. 674; 77 L. J. Ch. 617.

(*h*) *Renals* v. *Cowlishaw*, 9 C. D. p. 129; S. C. on appeal, 11 C. D. 866; 48 L. J. Ch. 830; *Rogers* v. *Hosegood*, (1900) 2 Ch. 388; 69 L. J. Ch. 652; *Reid* v. *Bickerstaff*, (1909) 2 Ch. pp. 320, 325; 78 L. J. Ch. 753.

Public bodies purchasing under statutory powers land subject to restrictive covenants.

Covenants restricting the user of land, will not be enforced against a public body which purchases land under its statutory powers for the purposes of its undertaking, the remedy of the covenantee for breach of the covenants being by way of compensation under sect. 68 of the Lands Clauses Consolidation Act, 1845 (*i*), but if part of the land is subsequently sold as superfluous land, the restrictions revive in respect of such part of the land and can be enforced against the purchaser (*k*).

Burden of affirmative covenants does not run with the land.

The principle of *Tulk* v. *Moxhay* (*l*), only applies to restrictive covenants, and does not apply to affirmative covenants binding the owner of the land at some future time to lay out money upon land or to do any act relating to land of what may be called an active character (*m*). The Court will not enforce a covenant not running at law with the land in such a way as to require the successors in title of the covenantor taking with notice to spend money on repairs and so undertake a burden (*n*). In like manner, where a man who had taken a lease of premises, subject to a restrictive covenant not to carry on upon the premises or permit or suffer any part thereof to be occupied by any person who should carry on there any noisome trade, made a sub-lease of the premises with a similar covenant on the part of the sub-lessee who entered into possession and began to carry on an offensive business, the Court would not compel the lessee to take proceedings against his tenant (*o*). So also where the defen-

(*i*) *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180; 38 L. J. Q. B. 98; *Kirby* v. *Harrogate School Board*, (1896) 1 Ch. 437; 65 L. J. Ch. 376; *Long Eaton Recreation Ground Co.* v. *Midland Railway Co.*, (1902) 2 K. B. 574; 71 L. J. K. B. 837.

(*k*) *Bird* v. *Eggleton*, 29 C. D. 1012; 54 L. J. Ch. 819.

(*l*) 2 Ph. 774; 78 R. R. 289.

(*m*) *Haywood* v. *Brunswick Permanent, &c. Society*, 8 Q. B. D. 403; 51 L. J. Q. B. 73; *London & South Western Railway Co.* v. *Gowen*, 20 C. D. p. 582; 51 L. J. Ch. 530; *Rogers* v. *Hosegood*, (1900) 2 Ch. 388, 405; 69 L. J. 652; *In re Nisbet and Potts' Contract*, (1905) 1 Ch. p. 397; 74 L. J. Ch. 310; affirmed on appeal, (1906) 1 Ch. 386; 75 L. J. Ch. 238.

(*n*) *Austerberry* v. *Corporation of Oldham*, 29 C. D. 750; 55 L. J. Ch. 633.

(*o*) *Hall* v. *Ewin*, 37 C. D. 74; 57 L. J. Ch. 95. See *Attorney-General* v. *Walthamstow Urban Council*, (1910) 1 Ch. 347; 79 L. J. Ch. 267.

dant who had purchased part of an estate subject to a restrictive covenant as to building, demised the land with a similar covenant on the part of his lessees, and the lessees committed breaches of their covenant and became bankrupt, and their trustee disclaimed the lease, the Court refused at the instance of an assignee of the vendor to order the defendant, who had re-entered into possession, to pull down the buildings erected in breach of the covenant, the breach not being a continuing one, and having been committed solely by the defendant's lessees, the defendant having done nothing himself to encourage or promote the breach (*p*).

Benefit of restrictive covenant annexed to land.

Although the burden of a restrictive covenant does not run at law, it is otherwise with the benefit of such a covenant. When the benefit of a restrictive covenant has been annexed to a piece of land, there is a presumption that it passes by an assignment of that land, and it may be said to run with the land in equity as well as at law, without proof of special bargain or representation on the assignment of the land (*q*).

Perpetual injunctions granted in cases of contract without regard to question of convenience,

In cases of covenant or agreement, where the breach is clear and the covenant or agreement is of such a nature that it can consistently with the rules and principles of the Court be specifically enforced, the Court will not, unless under very exceptional circumstances (*r*), take into consideration at the hearing the comparative injury to the parties from granting or withholding the injunction (*s*).

(*p*) *Powell* v. *Hemsley*, (1909) 1 Ch. 630; (1909) 2 Ch. 252; 78 L. J. Ch. 741.

(*q*) *Rogers* v. *Hosegood*, (1900) 2 Ch. 388; 69 L. J. Ch. 652; *Formby* v. *Barker*, (1903) 2 Ch. pp. 551, 552; 72 L. J. Ch. 716; and see *Ricketts* v. *Enfield*, (1909) 1 Ch. 544; 78 L. J. Ch. 294, where the assignee of a lessee enforced a covenant by the lessor with the lessee that the lessor and his assignee would not erect a building on land adjoining the demised premises.

(*r*) See *Bowes* v. *Law*, 9 Eq. p. 642; 39 L. J. Ch. 483; *Leader* v. *Moody*, 20 Eq. 145; 44 L. J. Ch. 711; *Osborne* v. *Bradley*, (1903) 2 Ch. p. 451; 73 L. J. Ch. 49; *Att.-Gen.* v. *Walthamstow Urban Council*, (1910) 1 Ch. p. 351; 79 L. J. Ch. p. 269.

(*s*) *Tipping* v. *Eckersley*, 2 K. & J. p. 270; 110 R. R. 216; *Johnstone* v. *Hall*, 2 K. & J. p. 420; 25 L. J. Ch. 465; 110 R. R. 296; *Dickenson* v. *Grand Junction Canal Co.*, 15 Beav. p. 270; *Doherty* v. *Allman*, 3 A. C. 719, 720; *Price* v. *Bala and Festiniog Railway Co.*, 50 L. T. 787; *McEacharn* v. *Colton*, (1902) A. C.

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The mere fact that there has been a breach of covenant is as a rule sufficient ground for the interference of the Court by injunction, for a covenantee has the right to have the actual enjoyment of property *modo et formâ* as stipulated for by him (*t*), and is entitled to have his right enforced by injunction without the necessity of showing damage (*u*).

or whether injury sustained by plaintiff,

It is no answer to say that the act complained of will inflict no injury on the plaintiff, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be preserved as far as he is concerned, or whether he shall permit it to be violated. It is not necessary that he should show that any damage has been done. It being established that the acts of the defendant are a violation of the contract entered into by him, the Court will protect the plaintiff in the enjoyment of the right which he has purchased (*x*).

Accordingly, where there is a negative covenant, the Court has, speaking generally, no discretion to consider the balance of convenience or matters of that nature, but is bound to give

unless plaintiff disentitled to sue by his conduct,

effect to the contract between the parties (*y*), unless the party seeking to enforce the covenant has by his own conduct, or by that of the persons through whom he claims, become disentitled to sue (*z*). But the Court will not refuse relief

p. 107; 77 L. J. P. C. 20; *Osborne* v. *Bradley*, (1903) 2 Ch. p. 451; 73 L. J. Ch. 49; *Harris* v. *Boots Cash Chemists Co.*, (1904) 2 Ch. p. 383; 73 L. J. Ch. 708; *Elliston* v. *Reacher*, (1908) 2 Ch. p. 395; S. C. on appeal, p. 665; 77 L. J. Ch. 617.

(*t*) *Johnstone* v. *Hall*, 2 K. & J. p. 423; 25 L. J. Ch. 465; 110 R. R. 296; *Western* v. *MacDermott*, 2 Ch. p. 75; 36 L. J. Ch. 76; *Manners* (*Lord*) v. *Johnson*, 1 C. D. p. 680; 45 L. J. Ch. 404; *Osborne* v. *Bradley*, (1903) 2 Ch. p. 451; 73 L. J. Ch. 49; *Elliston* v. *Reacher*, (1908) 2 Ch. p. 395; S. C. on appeal, p. 665; 77 L. J. Ch. 617.

(*u*) *Manners* (*Lord*) v. *Johnson*, 1 C. D. 673; 45 L. J. Ch. 404; *Richards* v. *Revitt*, 7 C. D. 224; 47 L. J. Ch. 472; *Elliston* v. *Reacher*, *supra*.

(*x*) *Dickenson* v. *Grand Junction Railway Co.*, 15 Beav. p. 270; *Wells* v. *Attenborough*, 24 L. T. 312; 19 W. R. 465; *Manners* (*Lord*) v. *Johnson*, 1 C. D. p. 680; 45 L. J. Ch. 404; *Richards* v. *Revitt*, 7 C. D. 224; 47 L. J. Ch. 472; *Collins* v. *Castle*, 36 C. D. 243; 57 L. J. Ch. 76; *Osborne* v. *Bradley*, (1903) 2 Ch. p. 451; 73 L. J. Ch. 49; *Elliston* v. *Reacher*, (1908) 2 Ch. p. 395; S. C. on appeal, p. 665; 77 L. J. Ch. 617.

(*y*) *Doherty* v. *Allman*, 3 A. C. 709, 719; *Osborne* v. *Bradley*, (1903) 2 Ch. p. 451; 73 L. J. Ch. 49.

(*z*) *Rayn* v. *Williams*, T. & R. 18; 23 R. R. 169; *Bedford* (*Duke*) v. *Trustees of British Museum*,

merely because in a few cases covenants restricting the user of land have not been enforced by the covenantee (*a*).

The rule enunciated by Lord Cairns in *Doherty* v. *Allman* (*b*), that in the case of negative covenants the Court must give effect to the contract between the parties, *primâ facie* applies to all restrictive covenants; though where the right of the covenantee is equitable only, the Court will more readily award damages than an injunction, but the absence of proof by the plaintiff of substantial damages is not by itself sufficient to warrant the Court adopting that course (*c*).

Interim injunction to restrain carrying on trade.

When an application is made to the Court to restrain a man from carrying on a trade or profession contrary to his covenant, the Court ought not to grant an injunction upon a *primâ facie* case, if it is satisfied that to do so would in effect prevent him from earning his livelihood. If an injunction is granted, conditions should be imposed to prevent such a result from ensuing (*d*).

Mandatory injunctions against breach of covenant.

In exercising the jurisdiction by way of mandatory injunction against acts in violation of contract, covenant, or agreement, the Court looks to the express stipulation of the agreement, and is not, as in cases of trespass or nuisance, influenced by considerations as to the nature or extent of the damage, or the comparative convenience or inconvenience of granting or withholding the injunction. A man who enters into an agreement is bound in equity to a true and literal performance of it. He cannot be suffered to depart from it

M. & K. 552; 2 L. J. (N. S.) Ch. 129; 39 R. R. 288; *Peek* v. *Matthews*, 3 Eq. 515; 16 L. T. 991; *Sayers* v. *Collyer*, 28 C. D. 103, 108; 54 L. J. Ch. 1; *Knight* v. *Simmonds*, (1896) 2 Ch. 294, 297, 298; 65 L. J. Ch. 583; *Craig* v. *Creer*, (1899) 1 I. R. 258; *Osborne* v. *Bradley*, (1903) 2 Ch. p. 451; 73 L. J. Ch. 49; *Sobey* v. *Sainsbury*, (1913) 2 Ch. 513; *Pulleyne* v. *France*, (1913) 57 S. J. 173.

(*a*) *German* v. *Chapman*, 7 C. D. pp. 278, 279; 47 L. J. Ch. 250; *Jackson* v. *Winnifrith*, 47 L. T. 243; *Knight* v. *Simmons*, (1896) 2 Ch. 294; 65 L. J. Ch. 583; *Elliston* v. *Reacher*, (1908) 2 Ch. pp. 392, 393; S. C. on appeal, p. 665; 77 L. J. Ch. 617; *Tubbs* v. *Esser*, (1910) 26 T. L. R. p. 146.

(*b*) 3 A. C. 709, 719.

(*c*) *Elliston* v. *Reacher*, (1908) 2 Ch. p. 395; S. C. on appeal, p. 665; 77 L. J. Ch. 617.

(*d*) *Palace Theatre Co.* v. *Clensy*, (1909) 26 T. L. R. 28, *per* Vaughan Williams, L.J.

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at his pleasure, leaving the other party to his remedy by damages at law (*e*). There may be cases in which it is so clear that the mischief to arise from a breach of covenant would be inappreciable that the Court may decline to interfere on the ground that a mandatory injunction would be out of all proportion to the requirements of the case, and would operate with extreme harshness on the defendant (*f*). But as a general rule, the inconvenience to the defendant will not in such cases be taken into consideration (*g*). Nor can the defendant be permitted to set up the inconvenience to the public which would arise from his being compelled to perform his agreement (*h*).

Inconvenience to public no answer.

The case of *Lane* v. *Newdigate* (*i*) is the first instance to be found in the books in which an order for a mandatory injunction was made against a breach of agreement. The plaintiff was assignee of a lease granted by the defendant for the purpose of erecting mills, and the defendant was bound by covenant to supply water for canals and reservoirs on his own estate to work the plaintiff's mills. The plaintiff brought his suit to enforce the execution of repairs by the defendant, and the restoration of a cut and stop-gate in existence at the date of the lease, and the removal of a lock which had been made since the date of the lease. Lord Eldon doubted whether he could order repairs to be done or the works to be restored, but arrived at the same end by restraining the defendant from

(*e*) *Storer* v. *Great Western Railway Co.*, 2 Y. & C. C. C. 48; 12 L. J. Ch. 65; 60 R. R. 23; *Lloyd* v. *London, Chatham, and Dover Railway Co.*, 2 D. J. & S. p. 579; 34 L. J. Ch. 401; *Att-Gen.* v. *Mid-Kent Railway Co.*, 3 Ch. 104; *Doherty* v. *Allman*, 3 A. C. p. 720; *Wolverhampton Corporation* v. *Emmons*, (1901) 1 Q. B. p. 522; 70 L. J. K. B. 429. See *Bickmore* v. *Dimmer*, (1903) 1 Ch. p. 168; 72 L. J. Ch. 96.

(*f*) *Bowes* v. *Law*, 9 Eq. 636; 39 L. J. Ch. 483; *Kilbey* v. *Haviland*, 19 W. R. 698. See *Lloyd* v. *London, Chatham, and Dover Railway Co.*, 2 D. J. & S. p. 580; 34 L. J. Ch. 401.

(*g*) *Manners (Lord)* v. *Johnson*, 1 C. D. 680; 45 L. J. Ch. 404.

(*h*) *Lloyd* v. *London, Chatham, and Dover Railway Co.*, 2 D. J. & S. 579; 34 L. J. Ch. 401; *Raphael* v. *Thames Valley Railway Co.*, 2 Ch. 147; 35 L. J. Ch. 659; *Price* v. *Bala and Festiniog Railway Co.*, 50 L. T. 787.

(*i*) 10 Ves. 192; 7 R. R. 381; and see *Jackson* v. *Normandy Brick Co.*, (1899) 1 Ch. 439, n.

Instances of mandatory injunctions.

hindering the enjoyment of the plaintiff by keeping the works out of repair, by the use of the lock, or by continuing the removal of the stop-gates (*k*). So also an agreement to grant a right of way was carried into effect by an injunction to restrain the removal of the materials and the destruction of the way (*l*). So also a man was restrained from continuing to keep up a wall on his land which obstructed a right which the plaintiff had under an agreement with him to use a certain road (*m*). So also the lessee of a field who in violation of the covenants in his lease caused the fall of one of the fences bounding the field by excavating the clay from under it, was compelled by a mandatory injunction in the negative form to restore the fence to its former condition (*n*). So also the Commissioners of Woods and Forests who had granted a lease of ground to the plaintiff as a site for a club house, and had covenanted in the lease that part of the land adjoining the ground so let should be laid out as an ornamental garden, and that no building should be erected thereon, were restrained from permitting such buildings as had already been erected from continuing on the ground (*o*). So also a lessee who had covenanted not to erect on the demised premises any building other than a stable and coach-house, and not to do on the demised premises any act which might be an annoyance to any tenant of the lessor, was ordered to pull down a substantial trellis-work screen (*p*). So also where the purchasers of plots of land on a residential building estate had covenanted not to erect any building for the carrying on of any noisy, noisome or offensive trade, and a lessee of one of the purchasers erected on his plot a large hoarding of a permanent nature and covered it with advertisements, the Court granted the owner of an adjoining plot a mandatory injunction for the

(*k*) See *Lord Kilmorey* v. *Thackeray*, cited 2 Bro. C. C. p. 64. Cf. *Blakemore* v. *Glamorganshire Railway Co.*, 1 M. & K. p. 184; 2 L. J. (N. S.) Ch. 95; 36 R. R. 289.

(*l*) *Newmarch* v. *Brandling*, 3 Sw. 99.

(*m*) *Phillips* v. *Treeby*, 8 Jur. N.S. 999; 6 L. T. 313.

(*n*) *Newton* v. *Nock*, 43 L. T. 197. See *Bidwell* v. *Holden*, 63 L. T. 104, where order made in positive form.

(*o*) *Rankin* v. *Huskisson*, 4 Sim. 13; 33 R. R. 86.

(*p*) *Wood* v. *Cooper*, (1894) 3 Ch. 671; 63 L. J. Ch. 515.

removal of the hoarding (*q*). So also the lessee of a shop and house who had covenanted not to remove the plate glass windows in front of the house without substituting others of equal value was restrained from allowing the shop to remain without plate glass windows (*r*). So also where a lessee of a house and shop had covenanted not to make any alteration in the elevation of the premises or alter the decorations or iron railings in front thereof, or to make any addition without the consent of the lessor, and, notwithstanding the covenant, commenced alterations in the front windows of the shop and removed the iron railings and made a new doorway, he was restrained by injunction and ordered to restore the front of the shop to the state in which it was before the bringing of the action (*s*). So also a solicitor who had sold his business to the plaintiff, but kept possession of the books contrary to his covenant, was restrained from keeping the books away from the possession of the plaintiff, and from permitting the same to remain away from the office of the plaintiff (*t*). So also a partner who had taken away one of the partnership books from the counting-house of the firm in breach of a covenant in the partnership deed was restrained from continuing to violate the covenant (*u*), and from keeping it at any other place than the partnership premises (*x*). So also trustees of a chapel were restrained from permitting a minister to officiate in the chapel contrary to a covenant entered into by them (*y*). So also a mine owner who had covenanted to leave sufficient barriers against the adjoining collieries, but had broken his covenant, was restrained from permitting a communication

(*q*) *Nussey* v. *Provincial Bill Posting Co.*, (1909) 1 Ch. 734; 78 L. J. Ch. 539.

(*r*) *Brocklesby* v. *Munn*, (1870) W. N. 42.

(*s*) *De Nicols* v. *Abel*, (1869) W. N. 14.

(*t*) *Whittaker* v. *Howe*, 3 Beav. 383; 52 R. R. 162; *Whitcham* v. *Moss*, 73 L. T. 57 (retention by clerk).

(*u*) *Taylor* v. *Davis*, 4 L. J. Ch. 18; 7 L. J. Ch. 179; 3 Beav. 388, n.; *Greatrex* v. *Greatrex*, 1 De G. & Sm. 692; 75 R. R. 251; *Charlton* v. *Poulter*, 19 Ves. 148, n. See *Davies* v. *Gas Light and Coke Co.*, (1909) 1 Ch. 248, 708; 78 L. J. Ch. 445.

(*x*) *Greatrex* v. *Greatrex*, *supra*. See Partnership Act, 1890, sect. 24, sub-sect. 9.

(*y*) *Foundling Hospital* v. *Garrett*, 47 L. T. 230.

with an adjoining mine to remain open and water to flow therefrom (*z*). So also a railway company which had agreed with a man to make a road at a certain level were restrained from making a road at a lower level than they had agreed to do (*a*). So also a railway company which had agreed with the vendor of land to use a certain portion of the land as and for a first-class station for the purpose of taking up and setting down passengers, were restrained from allowing their trains to pass the station without stopping (*b*). So also where a building has been erected in a form that is in violation of a contract or an Act of Parliament, the Court may restrain the defendant from using the building (*c*), or may compel him to alter the elevation or form of the building so as to be in conformity with the terms of the contract or the Act of Parliament, as the case may be (*d*).

Contract to maintain structure bearing defamatory inscription.

In a recent case (*e*) the Court refused to enforce by mandatory injunction a contract to maintain a structure bearing an inscription calculated to lead to a breach of the peace.

Form of.

It is now settled that a mandatory injunction may be framed in the form of a positive and direct order upon the defendant to do the act required (*f*).

Delay.

A man, however, who seeks a mandatory injunction must

(*z*) *Mexborough* (*Earl*) v. *Bower*, 7 Beav. 127; affd. 2 L. T. O. S. 205; 64 R. R. 34. See *Powell* v. *Aiken*, 4 K. & J. p. 355.

(*a*) *Foster* v. *Birmingham, Wolverhampton and Dudley Railway Co.*, 2 W. R. 378; 99 R. R. 882.

(*b*) *Hood* v. *North Eastern Railway Co.*, 5 Ch. 525; 23 L. T. 206. Cf. *Phillipps* v. *Great Western Railway Co.*, 7 Ch. 415; 41 L. J. Ch. 614; *Turner* v. *London and South Western Railway Co.*, 17 Eq. 561; 43 L. J. Ch. 430.

(*c*) *Dover Harbour* (*Warden*) v. *South Eastern Railway Co.*, 9 Ha. p. 493; 21 L. J. Ch. 886; *London, Chatham and Dover Railway Co.* v. *Bull*, 47 L. T. 413, 415.

(*d*) *Manners* (*Lord*) v. *Johnson*, 1 C. D. p. 680; 45 L. J. Ch. 404; *M'Manus* v. *Cooke*, 35 C. D. 681, 698; 56 L. J. Ch. 662. See *Storer* v. *Great Western Railway Co.*, 2 Y. & C. C. C. 48; 12 L. J. Ch. 65; 60 R. R. 23; *Child* v. *Douglas*, Kay, 577; 101 R. R. 736; *Price* v. *Bala, &c. Railway Co.*, 50 L. T. 787, 788 (buildings removed).

(*e*) *Woodward* v. *Battersea Borough Council*, (1911) 104 L. T. 51; 27 T. L. R. 196.

(*f*) *Jackson* v. *Normanby Brick Co.*, (1899) 1 Ch. 438; 68 L. J. Ch. 407; *Davies* v. *Gas Light and Coke Co.*, (1909) 1 Ch. p. 259; 78 L. J. Ch. 445; *Att.-Gen.* v. *Grand Junction Canal Co.*, (1909) 2 Ch. p. 516; 78 L. J. Ch. 681.

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use due diligence in making the application (*g*). In a case where a building had been erected by the defendant's predecessor in title in breach of covenant, and had been allowed to stand for five years, the Court would not interfere by mandatory injunction to order it to be pulled down (*h*). The Court will seldom interfere to pull down a building which has been erected without complaint (*i*).

Damages.

Instead of granting an injunction the Court may, when it is satisfied that such a course will be justified by the circumstances of the case, substitute damages for an injunction (*k*). But a man may by acquiescence in a breach of covenant not only deprive himself of his right to an injunction but of his right to recover damages in substitution for an injunction, or even nominal damages (*l*).

SECTION II.—INJUNCTIONS IN AID OF SPECIFIC PERFORMANCE.

A Court of equity has jurisdiction pending a suit for specific performance to restrain the vendor from alienating or affecting by other acts the subject-matter in litigation. Whether or not the jurisdiction will be exercised depends on the special circumstances of the case. If there is a clear, undisputed contract, the Court will not permit the vendor to transfer the legal estate to a third person (*m*). But if the validity of the contract is open to doubt, the question whether the vendor shall be permitted to transfer the legal estate to a third person, pending a suit for specific performance, be-

(*g*) *Ante*, p. 46.

(*h*) *Gaskin* v. *Balls*, 13 Ch. D. 324, 328; 28 W. R. 552.

(*i*) *Gaskin* v. *Balls*, *supra*. See *Powell* v. *Hemsley*, (1909) 2 Ch. 252, 259; 78 L. J. Ch. 741; but see *Price* v. *Bala and Festiniog Railway Co.*, 50 L. T. 787; *Lawrence* v. *Horton*, 59 L. J. Ch. 440; 62 L. T. 749 (completion after issue of writ).

(*k*) *Leader* v. *Moody*, 20 Eq. p. 154; 44 L. J. Ch. 711; *Sayers* v. *Collyer*, 28 C. D. pp. 108, 110; 52 L. J. Ch. 770; and see *Elliston* v. *Reacher*, (1908) 2 Ch. p. 395; S. C. on appeal, p. 665; 77 L. J. Ch. 617; *Jones* v. *Tankerville* (*Earl*), (1909) 2 Ch. pp. 445, 446; 78 L. J. Ch. 674.

(*l*) *Kelsey* v. *Dodd*, 52 L. J. Ch. 34.

(*m*) *Hadley* v. *London Bank of Scotland*, 3 De G. J. & S. 63, 70; 13 W. R. 978.

comes a question of comparative convenience or inconvenience. If, on the one hand, greater inconvenience would arise to the plaintiff from withholding the injunction than to the defendant from granting it, an injunction will be granted (*n*). If, on the other hand, greater inconvenience would arise to the defendant from granting the injunction than to the plaintiff from withholding it, an injunction will not be granted (*o*). Where, however, the legal estate is outstanding, an injunction to restrain the vendor from dealing with the property is unnecessary. It is sufficient in such a case for the purchaser to register the suit as a *lis pendens* (*p*).

In a case in which the unpaid vendor of land taken by a railway company had brought an action to enforce his lien and an order had been made declaring the plaintiff entitled to a lien and directing the purchase-money to be paid on or before a certain day, the defendants having made default in complying with the order, and there being evidence that the land was unsaleable, the Court granted an injunction restraining the defendants from running trains over the railway and from continuing in possession (*q*).

Relief may be given even against parties whose rights are independent of the contract. Thus, where the suit related to an agreement for the sale of a next presentation to a living, the bishop of the diocese was restrained from instituting, or in the case of a lapse taking place pending the suit, from collating to the living any clerk not nominated by the plaintiff (*r*).

Mandatory order for entry and inspection, &c.

Where an agreement had been entered into for the sale of a house at a fixed price, and of the fixtures and furniture at a valuation by a person named by the parties, but the vendor refused him permission to enter the premises for the

(*n*) Ib.; see *Preston* v. *Luck*, 27 C. D. 497.

(*o*) *Hadley* v. *London Bank of Scotland*, 3 De G. J. & S. 63; 13 W. R. 978.

(*p*) See 2 & 3 Vict. c. 11, ss. 4, 11; and see *Hadley* v. *London Bank of Scotland*, 3 De J. & S. pp. 69, 70; 13 W. R. 978.

(*q*) *Allgood* v *Merrybent and Darlington Railway Co.*, 53 C. D. 571; 55 L. J. Ch. 743.

(*r*) *Nicholson* v. *Knapp*, 9 Sim. 326; 7 L. J. (N. S.) Ch. 219; 47 R. R. 255.

Mandatory order to enforce purchase of timber growing on an estate.

purpose of valuation, a mandatory order was made to compel the vendor to allow the entry to enable the valuation to proceed (*s*). Where the plaintiffs had entered into a contract with the defendant for the purchase of timber growing on his estate with the right to enter upon the estate for the purpose of sawing and removing the timber, and the defendant repudiated the contract and forcibly ejected the plaintiffs from his estate, an injunction was granted restraining the defendant from preventing the due execution of the contract by the plaintiffs, even though the Court might not have been able to compel the plaintiffs to cut and remove the timber if they had refused to do so (*t*). Where serious injury might be done to property, the subject of the action, unless the defendant acted in a particular manner, which he could do with comparatively little trouble and risk, but which the plaintiff could not do at all, as where a colliery would be flooded, unless the person in possession under an agreement for a lease continued to pump, the interim preservation of the property was secured by the issue of a mandatory injunction restraining the defendant from ceasing to act in that particular manner, *e.g.*, pump out water (*u*).

(*s*) *Smith* v. *Peters*, 20 Eq. 511; 44 L. J. Ch. 613.

(*t*) *Jones & Co.* v. *Tankerville* (*Earl*), (1909) 2 Ch. 440; 78 L. J. Ch. 674.

(*u*) *Strelly* v. *Pearson*, 15 C. D. 113; 49 L. J. Ch. 406; Ord. L. 3.

CHAPTER XI.

INJUNCTIONS AGAINST THE DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS, PAPERS, SECRETS, ETC., ETC.

THE Court will, in the exercise of its equitable jurisdiction to correct abuse of confidence, restrain by injunction the disclosure of confidential communications, papers, and secrets.

In all cases where a confidential relationship can be shown to exist, the Court implies a contract on the part of a person who has derived any confidential communication through the relationship, that he will not use the information to the detriment of the person from whom he received it. Upon this principle, persons into whose possession papers, documents, or copies of books, have come, or who have had secrets confided in them, will be restrained from making an improper use of such materials and information (*a*). The obligation extends to those who have acquired their information at second hand from such persons (*b*). Accordingly, injunctions have been granted to restrain the use or publication of secret

(*a*) *Morison* v. *Moat*, 9 Hare, p. 255; 20 L. J. Ch. 513; on appeal 21 L. J. Ch. 248; 89 R. R. 416; *Ex parte Ward*, Jac. p. 80; *Yovatt* v. *Winyard*, 1 J. & W. 394; 21 R. R. 194; *Lewis* v. *Smith*, 1 Mac. & G. 417; 84 R. R. 108; *Williams* v. *Prince of Wales' Life Assurance Co.*, 23 Beav. 340; 113 R. R. 163; *Merryweather* v. *Moore*, (1892) 2 Ch. 518; 61 L. J. Ch. 505; *Robb* v. *Green*, (1895) 2 Q. B. 1; on appeal, p. 315; 64 L. J. Q. B. 593; *Summers* v. *Boyce*, (1907) 97 L. T. 505; 23 T. L. R. 724; *Kirchner* v. *Gruban*, (1909) 1 Ch. 413, 422; 78 L. J. Ch. 117; *Measures Brothers* v. *Measures*, (1910) 1 Ch. 336, 343; 79 L. J. Ch. p. 710; aff. on appeal on other grounds, (1910) 2 Ch. 248; 79 L. J. Ch. 712; *Liquid Veneer Co.* v. *Scott*, (1912) 29 R. P. C. 639; *Amber Size and Chemical Co.* v. *Menzel*, (1913) 2 Ch. 239; 82 L. J. Ch. 573; *Litholite Co.* v. *Travis and Insulators Co.*, (1913) 30 R. P. C. 266.

(*b*) *Tipping* v. *Clarke*, 2 Hare, p. 393; 62 R. R. 144; *Russell* v. *Jackson*, 9 Hare, p. 391; 21 L. J. Ch. 146; 89 R. R. 495; *Robb* v. *Green*, (1895) 2 Q. B. p. 16; 64 L. J. Q. B. 593; *Summers* v. *Boyce*; *Liquid Veneer Co.* v. *Scott*, *supra*; *Ashburton* (*Lord*) v. *Pape*, (1913) 2 Ch. 469; 82 L. J. Ch. 527.

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information obtained by clerks or servants in the course of their employment, such as a list of the names and addresses of the plaintiffs' customers copied from their books (*c*); a table of dimensions of machinery designed by the plaintiffs and collected from their plans by one of their draftsmen (*d*); materials for the construction of a book of advertisements collected by the plaintiffs' canvassers (*e*); the accounts and dealings of the plaintiffs' business (*f*); or their secret process of manufacture (*g*).

The jurisdiction extends to enable the Court to restrain a third party from using secret information which has been to his knowledge obtained or communicated in breach of faith, duty, or contract. Thus, where under a contract information was supplied to the plaintiffs by the Stock Exchange and the same information was surreptitiously obtained by the defendant from a third person, the defendant was restrained from publishing it (*h*).

The protection which is given by the Court to all who have employed any person in a confidential way in their affairs does not, however, extend to cases where a fraudulent transaction has come to the knowledge of such other person in the course of his employment (*i*). "An employer," said Lord Hatherley (*k*), "can have no property in iniquitous secrets."

Privilege between client and his legal advisers.

The rule which protects from disclosure confidential communications between a client and his counsel or solicitor (*l*),

(*c*) *Robb* v. *Green*, *supra*; *Louis* v. *Smellie*, (1895) 73 L. T. 226; W. N. 115; *Summers* v. *Boyce*; *Measures Brothers* v. *Measures*, note (*a*), *supra*.

(*d*) *Merryweather* v. *Moore*, (1892) 2 Ch. 518; 61 L. J. Ch. 505.

(*e*) *Lamb* v. *Evans*, (1892) 3 Ch. 462; 61 L. J. Ch. 681; (1893) 1 Ch. 218; 62 L. J. Ch. 404.

(*f*) *Summers* v. *Boyce*, *supra*.

(*g*) *Liquid Veneer Co.* v. *Scott*, (1912) 29 R. P. C. 639; *Amber Size and Chemical Co.* v. *Menzel*, (1913) 2 Ch. 239; 82 L. J. Ch. 573; *Litholite Co.* v. *Travis and Insulators Co.*, (1913) 30 R. P. C. 266.

(*h*) *Exchange Co.* v. *Gregory*, (1896) 1 Q. B. 147; 65 L. J. Q. B. 262; and see *Exchange Co.* v. *Central News*, (1897) 2 Ch. 48; 66 L. J. Ch. 672; *Summers* v. *Boyce*, (1907) 97 L. T. 505; 23 T. L. R. 726; *Ashburton* (*Lord*) v. *Pape*, (1913) 2 Ch. 469; 82 L. J. Ch. 527 (plaintiff's letters to his solicitor obtained by defendant from the solicitor's clerk).

(*i*) *Gartside* v. *Outram*, 26 L. J. Ch. 113; 3 Jur. (N. S.) p. 40.

(*k*) Ib.

(*l*) *Greenough* v. *Gaskell*, 1 My. &

does not rest simply upon the confidence reposed by the client in his legal adviser, for there is no such rule in other cases in which, at least, equal confidence is reposed; in the cases, for instance, of the medical adviser and the patient, and of the clergyman and the prisoner (*m*). The rule rests not only upon the confidence itself, but upon the necessity of carrying it out. It is for the interests of justice that the most full, free, and complete communication should take place between a client and his legal adviser, for if that did not take place, it would be impossible to conduct a suit or to obtain justice, or for a man to defend himself and to prevent an injustice (*n*).

The privilege is not confined to litigation actually commenced or in contemplation, but extends to all communications which pass between a client and his legal adviser in the course and for the purpose of the business (*o*). The privilege does not terminate with the death of the client, but belongs after his death to persons claiming under him as against parties claiming adversely to him; but it does not belong to executors as against the next of kin, nor to one of two parties claiming under the client rather than to the other, but, following the legal interest, is subject to the trusts and incidents to which the legal interest is subject (*p*). The privilege is limited to communications of a solicitor with his client and those persons necessarily employed under the solicitor, and does not extend to communications between a solicitor and third parties (*q*).

K. 98; 39 R. R. 258; *Russell* v. *Jackson*, 9 Hare, p. 391; 21 L. J. Ch. 146; 89 R. R. 495; *Slade* v. *Turner*, 14 C. D. p. 828; 49 L. J. Ch. 644; *Wheeler* v. *Le Marchant*, 17 C. D. p. 682; 50 L. J. Ch. 793; *Ainsworth* v. *Wilding*, (1900) 2 Ch. p. 321; 69 L. J. Ch. 695; *Rakusen* v. *Ellis Munday & Co.*, (1912) 1 Ch. pp. 834, 835; 81 L. J. Ch. 409.

(*m*) *Greenough* v. *Gaskell*, 1 M. & K. p. 103; 39 R. R. 258; *Normanshaw* v. *Normanshaw*, 69 L. T. 468.

(*n*) *Greenough* v. *Gaskell*, *supra*; *Bullivant* v. *Att.-Gen. for Victoria*, (1901) A. C. p. 201; 70 L. J. K. B. 645; *Jones* v. *Great Central Railway Co.*, (1910) A. C. p. 5; 79 L. J. K. B. 191.

(*o*) *Minet* v. *Morgan*, 8 Ch. 366, 368; 42 L. J. Ch. 627; *Wheeler* v. *Le Marchant*, 17 C. D. p. 682; 50 L. J. Ch. 793.

(*p*) *Russell* v. *Jackson*, 9 Hare, p. 393; 21 L. J. Ch. 146; 89 R. R. 495; *Bullivant* v. *Att.-Gen. for Victoria*, (1901) A. C. p. 206; 70 L. J. K. B. 645.

(*q*) *Ford* v. *Tennant*, 32 Beav. 162; 32 L. J. Ch. 465; *Anderson*

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In the exercise of its jurisdiction by injunction the Court draws a distinction between cases where a solicitor voluntarily makes a communication of what has come to his knowledge in the course of his professional employment and cases where he is required to disclose what he knows by giving evidence before a Court of justice (*r*). In the one case the Court will interfere by injunction (*s*). In the other case it will not interfere (*t*).

The existence of an illegal purpose or fraud will prevent any privilege from attaching to the communications between a solicitor and client (*u*).

As a general rule, a document once privileged is always privileged (*x*). But the privilege is that of the client, "and not the privilege of the confidential agent" (*y*); and accordingly it may be waived by the client (*z*). The privilege will be enforced, at the instance of the client, as well against the solicitor's partner (*a*) as against the solicitor himself.

Injunction to restrain solicitor acting against former client.

With the further view to the protection of a client from the disclosure of confidential communications, the Court will restrain a solicitor from disclosing any secrets which have been confidentially reposed in him, but there is no general rule that a solicitor who has acted in a particular matter for one party cannot subsequently act in the matter or anything connected with it for the opposite party: whether the solicitor can so act or not depends on the circumstances of the particular case. If there exists, or may be reasonably anticipated

v. *Bank of British Columbia*, 2 C. D. p. 656; 45 L. J. Ch. 449; *Ainsworth* v. *Wilding*, (1900) 2 Ch. p. 324; 69 L. J. Ch. 695; and see *Jones* v. *Great Central Railway Co.*, (1910) A. C. 4; 79 L. J. K. B. 191.

(*r*) *Beer* v. *Ward*, Jac. 77.

(*s*) *Lewis* v. *Smith*, 1 M. & G. 417; 84 R. R. 108.

(*t*) *Beer* v. *Ward*, *supra*.

(*u*) *Follett* v. *Jefferyes*, 1 Sim. (N. S.) 3; 20 L. J. Ch. 65; 89 R. R. 1; *Russell* v. *Jackson*, 9 Hare, 387; 21 L. J. Ch. 146; 89 R. R. 495; *Williams* v. *Quebrada, Railway, etc. Co.*, (1895) 2 Ch. 751; *Bullivant* v. *Att.-Gen. for Victoria*, (1901) A. C. 196, 201; 70 L. J. K. B. 645.

(*x*) *Calcraft* v. *Guest*, (1898) 1 Q. B. p. 761; 67 L. J. Q. B. 505; *Goldstone* v. *Williams, Deacon & Co.*, (1899) 1 Ch. 51, 52; 68 L. J. Ch. 24.

(*y*) *Anderson* v. *Bank of British Columbia*, 2 C. D. p. 649; 45 L. J. Ch. 449.

(*z*) Ib.; *Calcraft* v. *Guest*, (1898) 1 Q. B. p. 761; 67 L. J. Q. B. 505; *Procter* v. *Smiles*, 55 L. J. Q. B. 527.

(*a*) *Davies* v. *Clough*, 8 Sim. 262; 6 L. J. (N. S.) Ch. 113; 42 R. R. 171.

to exist, a danger of the solicitor committing a breach of the confidence reposed in him, the Court will restrain him from acting for the new client, but in the absence of such danger the Court will not interfere (*b*).

In a proper case the injunction will issue, notwithstanding acquiescence by the former client for some time in the employment of the solicitor by the new client (*c*). The fact that the new client may suffer material inconvenience cannot be taken into consideration (*d*). The injunction goes to restrain the client from employing the solicitor, as well as the solicitor from being employed (*e*).

Trade secrets.

The name of a secret preparation may be used by anyone for goods actually prepared according to the recipe (*f*). Until the secret is discovered the goods of the original inventor or his successors can be the only goods to which the name is applicable, but if a person can discover the recipe, he can, it seems, use the name if he can do so without passing off his goods for those of the original inventor (*g*).

If a man who has a trade secret employs persons under a contract, either express or implied, or under a duty, express or implied, not to disclose the secret, those persons cannot gain the knowledge of the secret and then set it up against their employer (*h*). In *Morison* v. *Moat* (*i*), the plaintiffs were the inventors of a secret medicine, and had communicated the

(*b*) *Rakusen* v. *Ellis, Munday & Clarke*, (1912) 1 Ch. 831; 81 L. J. Ch. 409; decision of Hall, V.-C., in *Little* v. *Kingswood Collieries Co.*, 20 C. D. 733; 51 L. J. Ch. 498, overruled.

(*c*) *Hobhouse* v. *Hamilton*, Sau. & Sc. 359, n.

(*d*) Ib.

(*e*) Ib. See *Little* v. *Kingswood Collieries Co.*, 20 C. D. 733; 51 L. J. Ch. 498; *Rakusen* v. *Ellis, Munday & Clarke*, (1912) 1 Ch. p. 842; 81 L. J. Ch. 409.

(*f*) *Canham* v. *Jones*, 2 V. & B. 218; 13 R. R. 70.

(*g*) *Siegert* v. *Findlater*, 7 C. D. 801; 47 L. J. Ch. 233; *Birmingham Vinegar Co.* v. *Powell*, (1897) A. C. p. 717; 66 L. J. Ch. p. 769.

(*h*) *Williams* v. *Williams*, 3 Mer. p. 160; 17 R. R. 49; *Yovatt* v. *Winyard*, 1 J. & W. 394; 21 R. R. 194; *Morison* v. *Moat*, 9 Ha. 241; 20 L. J. Ch. 513; aff. 21 L. J. Ch. 248; *Robb* v. *Green*, (1895) 2 Q. B. 318, 319; 64 L. J. Q. B. 593; *Liquid Veneer Co.* v. *Scott*, (1912) 29 R. P. C. 639; *Amber Size and Chemical Co.* v. *Menzel*, (1913) 2 Ch. 239; 82 L. J. Ch. 573; *Litholite Co.* v. *Travis and Insulators Co.*, (1913) 30 R. P. C. 266.

(*i*) 9 Ha. 241; aff. 21 L. J. Ch. 248.

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secret to the father of the defendant, whom they took into partnership in consideration of his devoting all his time to the manufacture of the medicine. Previously to the secret being communicated to him he had entered into a bond never to divulge it, but, in violation of his bond, the defendant's father communicated it to the defendant. The Court restrained the defendant from selling the medicine under the name of that prepared according to the secret receipe, inasmuch as it was by the use of the name that he was availing himself of the breach of faith on the part of his father (*k*).

Partners.

Parties, however, in possession of a trade secret, who take a man into partnership without making any stipulation as to the trade secret, and permit him to acquire a full knowledge of the secret, will be considered to have waived their right to preserve the secret for their separate benefit (*l*).

When a man has, without unfair means, become acquainted with the secret of the preparation of an unpatented article, he may make use of his knowledge, and compound and sell the article himself in his own name, though it be the same as that of the proprietor of the secret, provided that he does not induce the public to believe that it was made by the proprietor of the secret or his representative, or that he is the successor in business of the proprietor of the secret (*m*).

The purchasers from the trustee of a bankrupt of his interest in a sauce, the secret of which they did not acquire, cannot have an injunction to restrain the original inventor from making the sauce, of which he alone knows the recipe, under the original title (*n*).

Motion to restrain disclosure of secrets may be heard *in camerâ*.

A motion to restrain a defendant from disclosing confidential information will be heard *in camerâ* where the object of the motion would be defeated by its being heard in open Court (*o*).

(*k*) See *Leather Cloth Co.* v. *Lorsont*, 9 Eq. 354; 39 L. J. Ch. 80.

(*l*) *Morison* v. *Moat*, 9 Ha. 241; 20 L. J. Ch. 513; aff. 21 L. J. Ch. 248.

(*m*) *Massam* v. *Thorley's Cattle Food Co.*, 14 C. D. 748; 28 W. R. 966.

(*n*) *Cotton* v. *Gillard*, 44 L. J. Ch. 90.

(*o*) *Mellor* v. *Thompson*, 31 C. D. 55; 55 L. J. Ch. 942. See *Scott* v. *Scott*, (1913) A. C. pp. 448, 482; 82 L. J. P. pp. 89, 108; *Reddaway* v. *Flynn*, (1913) 30 R. P. C. 16; and see this case as to limited order for discovery.

CHAPTER XII.

INJUNCTIONS TO RESTRAIN LIBEL, SLANDER OF TITLE, AND THREATS OF PROCEEDINGS.

THE Court has jurisdiction to restrain by injunction the publication of a libel or the making of slanderous statements calculated to injure a man in his business and also a mere personal libel (*a*).

The jurisdiction, however, to restrain on interlocutory application the publication of defamatory statements is of a delicate nature, and will be exercised with caution (*b*), especially when the statements are oral (*c*). There are cases in which it would be quite proper to exercise the jurisdiction, as, for instance, in the case of an atrocious libel wholly unjustified and inflicting serious injury on the plaintiff. But, on the other hand, where there is a case to try and no immediate injury to be expected from the further publication of the libel, the Court will be unwilling to interfere by interlocutory injunction (*d*). The jurisdiction will not, as a general rule, be exercised unless the Court is satisfied that the statement in the libel is untrue, and that the publication proposed to be restrained is of such a character that any jury would find it libellous, and where, if the jury did not so find, the Court

(*a*) *Hermann Loog* v. *Bean*, 26 C. D. 306; 53 L. J. Ch. 1128; *Bonnard* v. *Perryman*, (1891) 2 Ch. 269; 60 L. J. Ch. 617; *Monson* v. *Tussauds*, (1894) 1 Q. B. 671; 63 L. J. Q. B. 454.

(*b*) *Quartz Hill, etc., Mining Co.* v. *Beall*, 20 C. D. p. 511; 51 L. J. Ch. 874; *Salomons* v. *Knight*, (1891) 2 Ch. 294; 60 L. J. Ch. 743; *Collard* v. *Marshall*, (1892) 1 Ch. 571; 61 L. J. Ch. 268; *Champion* v. *Birmingham Vinegar Brewery Co.*, 10 T. L. R. 164; *Monson* v. *Tussauds*, *supra*; *Lloyds Bank* v. *Royal British Bank*, (1903) 19 T. L. R. 548; *Corelli* v. *Wall*, (1906) 22 T. L. R. 532.

(*c*) *Hermann Loog* v. *Bean*, 26 C. D. 306; 53 L. J. Ch. 1128.

(*d*) *Quartz Hill, etc., Mining Co.* v. *Beall*, 20 C. D. p. 508; 51 L. J. Ch. 874; and see *Salomons* v. *Knight*, *Monson* v. *Tussauds*, *supra*; *Watson* v. *Daily Record* (*Glasgow*), (1907) 1 K. B. 853; 76 L. J. K. B. 448.

would set aside the verdict as unreasonable (*e*). Still more caution is requisite where the document is *primâ facie* a privileged communication, so as not to be actionable unless express malice is proved, the question of malice being one which cannot be satisfactorily tried on interlocutory application (*f*).

Defamatory statements in the case of companies.

In a case where a solicitor acting for some shareholders in a company printed and circulated, but only among shareholders, a circular containing very strong reflections on the mode in which the company had been brought out and on the conduct of the promoters and directors, and proposing a meeting of shareholders to take steps to promote their interests, the Court, not being satisfied that the statements in the document were false or malicious, would not interfere by interlocutory injunction (*g*).

The Court will not grant an interlocutory injunction which will restrain the fair discussion in a newspaper of matters of such importance as that of the probable success or failure of a public company; although if anything is published in a newspaper which is grossly libellous, there is ground for an injunction. A newspaper occupies a peculiar position, especially with regard to matters of public interest which concern those among whom the paper circulates, such as the position and prospects of a public company (*h*).

Nor will the Court grant an injunction with reference to the publication in future of statements in respect to which the Court cannot possibly decide whether a jury would find them to be libellous or not (*i*). In a case where a trading company

(*e*) *Coulson* v. *Coulson*, 3 T. L. R. 846; *Liverpool Stores Association* v. *Smith*, 37 C. D. 170; 57 L. J. Ch. 85; *Bonnard* v. *Perryman*, (1891) 2 Ch. 269, 284; 60 L. J. Ch. 617; *Monson* v. *Tussauds*, (1894) 1 Q. B. p. 676; 63 L. J. Q. B. 454; *Lloyds Bank* v. *Royal British Bank*, (1903) 19 T. L. R. 548; *Corelli* v. *Wall*, (1906) 22 T. L. R. 532.

(*f*) *Quartz Hill, etc., Mining Co.* v. *Beall*, 20 C. D. p. 509; 51 L. J. Ch. 874; *Poulett* v. *Chatto and Windus*, (1887) W. N. 192.

(*g*) *Quartz Hill, etc., Mining Co.* v. *Beall*, 20 C. D. 501; 51 L. J. Ch. 874.

(*h*) *Liverpool, etc., Stores Association* v. *Smith*, 37 C. D. 170; 57 L. J. Ch. 85.

(*i*) *Liverpool, etc., Stores Association* v. *Smith*, 37 C. D. 170; 57 L. J. Ch. 85; and see *Plumbly* v. *Perryman*, (1891) W. N. 64.

claimed an interlocutory injunction to restrain the publication in a newspaper of letters and statements in the future similar to those which had been already inserted in the same newspaper reflecting on the solvency and financial condition of the company, the Court would not interfere, on the ground that it would be almost, if not entirely, impracticable so to frame the injunction as not possibly to include in its terms something that might not be libellous; and if an injunction were granted in terms confined to the publication of "libellous" letters, it would have to be decided on motion to commit whether what was published was libellous or not (*k*).

Nor will the Court interfere upon interlocutory application to restrain the further publication of a libel where the mischief, if any, has been done, and there is no intention on the part of the defendant to issue any more libellous statements (*l*).

Trade libels.

The Court has jurisdiction to restrain a man from making slanderous statements calculated to injure another man in his trade or business (*m*). The jurisdiction extends to oral as well as written statements, though it requires to be exercised with great caution as respects oral statements (*n*). The Court will not, however, restrain by injunction the publication of statements which are in the nature of a slander of title or are to the injury of another in his trade or business, unless it is proved to the satisfaction of the Court (i.) that the statements are false; (ii.) that they were made maliciously, *i.e.*, without just cause or excuse; and (iii.) that the plaintiff has suffered special damage thereby (*o*). When the false

(*k*) *Liverpool Stores Association* v. *Smith*, 37 C. D. 170; 57 L. J. Ch. 85.

(*l*) *Quartz Hill, etc., Mining Co.* v. *Beall*, 20 C. D. 501, 509; 51 L. J. Ch. 874; see *Watson* v. *Daily Record (Glasgow)*, (1907) 1 K. B. 853; 76 L. J. K. B. 448.

(*m*) *Collard* v. *Marshall*, (1892) 1 Ch. 571, 577; 61 L. J. Ch. 268; *White* v. *Mellin*, (1895) A. C. 154; 64 L. J. Ch. 308; *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot* (1904), 20 T. L. R. 579; and see *Lyne* v. *Nicolls*, (1906) 23 T. L. R. 86; *Barrett* v. *Associated Newspapers Co.*, (1906) 23 T. L. R. 666.

(*n*) *Hermann Loog* v. *Bean*, 26 C. D. 306; 53 L. J. Ch. 1108.

(*o*) *Royal Baking Powder Co.* v. *Wright*, (1901) 18 R. P. C. 95 (H. L.); *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot*, (1904) 20

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statements are in their very nature reasonably likely to produce and in the ordinary course of things do produce a general loss of business, evidence of such general loss of business is admissible to prove special damage (*p*).

The publication of a misleading report of a trade mark action, or of an order made therein, may be a trade libel within the principle of the above cases (*q*).

The making of false statements as to a trader's goods gives no ground for an action of libel, but if the trader proves that he has suffered damage, he can recover in an action on the case (*r*). On the other hand the words used, though directly disparaging the trader's goods, may impute such misconduct or want of skill in the conduct of his business as to justify an action for libel (*s*).

Puffing statements.

A mere puff of the defendant's own goods or a statement that they are superior to those of a rival trader, even if untrue and made maliciously and the cause of damage to the latter, is not actionable (*t*).

Use of firm name by ex-employé.

So also a statement by a defendant that he comes with many years' experience from the plaintiff's firm, though untrue, cannot be restrained by injunction, such a use of a firm name being mere puff. To be entitled to an injunction in such cases it is necessary for the plaintiff to satisfy the Court that such a false statement amounts to a representation that

T. L. R. p. 580; *Alcott* v. *Millar's Karri, etc., Forests Co.*, (1904) 21 T. L. R. p. 31; (1905) 91 L. T. p. 724; *Lyne* v. *Nicholls*, (1906) 23 T. L. R. p. 87; *Barrett* v. *Associated Newspapers Co.*, note (*m*), *supra*; *Cundey* v. *Lerwill*, (1908) 99 L. T. p. 275; 24 T. L. R. p. 586; *Leetham* v. *Rank*, (1912) 57 S. J. 111; see also *London and North Western Bank* v. *Newnes*, 16 T. L. R. 96.

(*p*) *Ratcliffe* v. *Evans*, (1892) 2 Q. B. p. 533; 61 L. J. Q. B. 535; *Lyne* v. *Nicholls*, (1906) 23 T. L. R. p. 884; *Concaris* v. *Duncan*, (1909) W. N. 51; *Leetham* v. *Rank*, *supra*.

(*q*) *Hayward & Co.* v. *Hayward & Sons*, 34 C. D. 198; 56 L. J. Ch. 287.

(*r*) See cases note (*o*), *supra*, and *Griffiths* v. *Benn*, (1911) 27 T. L. R. pp. 346, 350.

(*s*) See *Linotype Co.* v. *British Empire Typesetting Machine Co.*, 81 L. T. 331 (H. L.); *Griffiths* v. *Benn*, *supra*.

(*t*) *Hubbuck* v. *Wilkinson*, (1899) 1 Q. B. 86; 68 L. J. Q. B. 34; *Alcott* v. *Millar's Karri, etc., Forests Co.*, (1904) 21 T. L. R. p. 31; (1905) 91 L. T. pp. 723, 724; *Cundey* v. *Lerwill*, (1908) 99 L. T. 273; 24 T. L. R. 584.

the plaintiff is a partner, so exposing him to liability, or that it tends to the passing off of the defendant's goods or business as the plaintiff's, or that it tends to disparage the plaintiff's goods, and causes him special damage (*u*).

Use of doctor's name to puff sale of medicine.

So also a doctor whose name had been used without his authority in an advertisement to puff the sale of a medicine was held to have no cause of action either for damages or for an injunction unless he could show that the publication was defamatory, or was injurious to him in his property or profession (*x*).

But where the defendant published a statement which was untrue, that his paper was the one read extensively in a certain district, and that its circulation was twenty to one of any other paper in the district, and was the only paper which could give a comprehensive view of what the inhabitants were doing, it was held that the statements were not mere puff, but amounted to an untrue disparagement of the plaintiff's paper and actionable on proof of special damage (*y*).

Under the law as it existed before the Patents, Designs and Trade Marks Act of 1883 (*z*) a person who had a *bonâ fide* belief that he had a patent right might issue circulars or advertisements threatening legal proceedings against persons infringing it. It was immaterial that his belief was without foundation. It was enough that he had a *bonâ fide* belief that his allegations were true, unless the person threatened could prove that the statements were untrue and made maliciously, he had no remedy (*a*).

Threats action.

Sect. 32 of the Act of 1883 created a new cause of action, viz., the right to sue for threats though made *bonâ fide*, but with the proviso that the section should not apply if the person making the threats with due diligence, commenced and

(*u*) *Cundey* v. *Lerwill*, *supra*.

(*x*) *Dockrell* v. *Dougall*, 80 L. T. 556.

(*y*) *Lyne* v. *Nicholls*, (1906) 23 T. L. R. 86.

(*z*) 46 & 47 Vict. c. 57.

(*a*) *Halsey* v. *Protherhood*, 19 C. D. 386; 51 L. J. Ch. 223; *Driffield Linseed Cake Co.* v. *Waterloo Mills Co.*, 31 C. D. p. 642; 55 L. J. Ch. 391; *Skinner* v. *Shew.* (1893) 1 Ch. p. 423; 62 L. J. Ch 196; *Lycett Saddle Co.* v. *Brooks & Co.*, (1904) 21 R. P. C. p. 664; *Craig* v. *Dowding*, (1908) 98 L. T. p 233; 25 R. P. C. 259.

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Patents and Designs Act, 1907, ss. 36, 61.

prosecuted an action for infringement of his patent (*b*). Sect. 32 has been repealed and re-enacted by sect. 36 of the Patents and Designs Act of 1907 (*c*) which provides that where any person claiming to be the patentee of an invention, by circulars, advertisements or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats; provided that the section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent (*d*).

Sect. 61 of the Act of 1907 applies the provisions of sect. 36 to the case of groundless threats by the proprietor of a registered design. There is, however, no action for threats in respect of a trade mark. The publication in good faith of a statement that the plaintiff is infringing the defendant's trade mark, and that the defendant intends to proceed against all persons dealing in the infringing goods cannot be restrained by injunction (*e*).

A person threatened with an action has a right under sect. 36 to sue for an injunction to restrain the continuance of such threats, if the alleged patentee or proprietor of the registered design does not avail himself of the proviso by which the burden of taking proceedings is thrown upon him (*f*). If an action to test the validity of the patent or design or the fact of its infringement is honestly brought and prosecuted with due diligence against the person or any of the

(*b*) See *Craig* v. *Dowding*, *supra*.

(*c*) 7 Edw. 7, c. 29.

(*d*) The threats of legal proceedings referred to in this section need not relate to acts already committed, but may also be warnings directed to future acts: *Kurtz* v. *Spence*, 57 L. J. Ch. 238; 5 R. P. C. 161; *Johnson* v. *Edge*, (1892) 2 Ch. 1; 61 L. J. Ch. 262.

(*e*) *Colley* v. *Hart*, 6 R. P. C. 17.

(*f*) *Driffield Linseed Cake Co.* v. *Waterloo Mills Co.*, 31 C. D. 638 643; 51 L. J. Ch. 223.

persons to whom the threats were made, the proviso is satisfied and the clause does not apply (*g*). It is not required by the proviso that the action should be brought against the person who is applying for an injunction against the threats; it is sufficient if it is brought against any of the persons who have been threatened (*h*). In considering whether an action is brought with "due diligence," the time of issuing the threats and not the time when the party bringing the action first knew of the acts which he alleges to be infringements is the period looked to (*i*).

Threats of legal proceedings for infringement of patents or registered designs are actionable whether addressed to the alleged infringer himself or intimated to a third person (*k*), and are none the less "threats" within the meaning of the section because they are made in answer to inquiries (*l*), or in a letter written "without prejudice" (*m*). In construing the expression in sect. 36, threats "by circulars, advertisements or otherwise," the words "or otherwise" are to be read not as being restricted to threats by measures *ejusdem generis* with "circulars or advertisements" but as extending the previous words so as absolutely to prohibit any threats whatever of legal proceedings, unless the case comes within either of the two saving clauses at the end of the section (*n*). A mere general warning to the public

(*g*) *Challender* v. *Royle*, 36 C. D. 425; 56 L. J. Ch. 995; *Metropolitan Gas Meters Co.* v. *British, Foreign, etc., Light Co.*, (1913) 1 Ch. p. 153; 82 L. J. Ch. 74.

(*h*) *Challender* v. *Royle, supra*; *Z Electric Lamp Co.* v. *Osram Lamp Works Co.*, (1911) 28 R. P. C. 479.

(*i*) *Challender* v. *Royle, supra*; *Haskell Golf Ball Co.* v. *Hutchison*, (1904) 21 R. P. C. 497; 20 T. L. R. 606. As to due diligence, see also *Colley* v. *Hart*, 44 C. D. 179; 59 L. J. Ch. 308; *Edlin* v. *Pneumatic Tyre Cycle Agency*, 10 R. P. C. 311; *Bishop* v. *Inman*, 17 R. P. C. 749.

(*k*) *Skinner & Co.* v. *Shew & Co.*, (1893) 1 Ch. 413; 62 L. J. Ch. 196; *Hoffnung* v. *Salsbury*, 16 R. P. C. 375.

(*l*) *Skinner & Co.* v. *Shew & Co.*, (1893) 1 Ch. 413; 62 L. J. Ch. 196; cf. *Beven* v. *Welsbach Incandescent Light Co.*, (1903) 20 R. P. C. 73, 74. As to general warnings not to infringe, see *Challender* v. *Royle*, 36 C. D. p. 441; 56 L. J. Ch. 995; *Johnson* v. *Edge*, (1892) 2 Ch. 1; 61 L. J. Ch. 262; *Crowther* v. *United Flexible Tube Co.*, (1905) 22 R. P. C. 549.

(*m*) *Kurtz* v. *Spence*, 57 L. J. Ch. 238; 58 L. T. 438.

(*n*) *Skinner & Co.* v. *Shew & Co.*, *supra*.

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that the patentee has a patent, and that infringers will be proceeded against, is not an actionable threat, being no more than what the patent itself implies (*o*).

In action to restrain threats, *bonâ fides* of defendant no answer.

In an action to restrain threats of legal proceedings under sect. 36, no defence can be based upon the ground that what the defendant did was done *bonâ fide*, or that it was done on a privileged occasion (*p*).

Due diligence.

In order that an action by the owner of a patent, or registered design, for the infringement of his patent or design, should be "prosecuted with due diligence" within the meaning of the proviso to sect. 36, so as to exclude the operation of the former part of that section, it is not necessary that the infringement action should be prosecuted up to judgment. The plaintiff will not lose the protection of the proviso by reason of his discontinuing the action before trial upon discovering that he has no cause of action, or by not succeeding at the trial (*q*).

Where the proviso is satisfied, the section does not apply, and the case comes under the old law as it was before the Act of 1883, and must be dealt with as if sect. 36 did not exist (*r*). Where accordingly a man brought an action under the section to restrain a patentee from issuing a circular intimating his intention to take legal proceedings against infringers of his patent, and the patentee thereupon brought an action against him, it was held, though the patent was proved on trial to be invalid, that the action against the patentee under the section should be dismissed, there being no evidence to show that at the time the circular was issued, the defendant had not a *bonâ fide* belief that he had a

(*o*) *Challenger* v. *Royle*, 36 C. D. 425; 56 L. J. Ch. 995; *Johnson* v. *Edge*, (1892) 2 Ch. pp. 9, 10; 61 L. J. Ch. 262; *Crowther* v. *United Flexible Tube Co.*, note (*l*), *supra*.

(*p*) *Skinner & Co.* v. *Shew & Co.*, note (*n*), *supra*; *Craig* v. *Dowding*, (1908) 98 L. T. p. 233; 25 R. P. C. p. 264.

(*q*) *Colley* v. *Hart*, 44 C. D. 179; 59 L. J. Ch. 308; *English and American Machinery Co.* v. *Gare Machine Co.*, 11 R. P. C. p. 632; *Craig* v. *Dowding*, (1908) 98 L. T. p. 233; 25 R. P. C. 264.

(*r*) *Colley* v. *Hart*, *Craig* v. *Dowding*, *supra*. See *Metropolitan Gas Meters Co.* v. *British and Foreign, etc., Light Controlling Co.*, (1913) 1 Ch. p. 153; 82 L. J. Ch. 74.

perfect legal right to the exclusive enjoyment of the patent (*s*).

Remedy of plaintiff in threats action.

The plaintiff in a threats action will, if successful, be entitled to an injunction and damages (*t*). In addition to the remedy of a perpetual injunction at the trial he may move for an interim injunction till the hearing (*u*). Such motion should not be made *ex parte*, but on notice (*x*). The Court will not, however, grant an interim injunction unless the plaintiff shows a strong *primâ facie* case (*y*). It will not be conceded on a mere balance of convenience (*z*). In order to obtain an interim injunction the plaintiff must satisfy the Court that he has not infringed the defendant's patent or registered design (*a*), and, if an infringement action by the defendant is pending, that it has not been brought *bonâ fide* or with due diligence, or that it is not being duly prosecuted (*b*). The proceedings in a threats action are generally stayed to abide the result of the defendant's action for infringement on the defendant undertaking to prosecute his action with due diligence, and not to issue new threats, the stay of proceedings in the threats action to be removed in the event of the defendant issuing threats, or not prosecuting his action with due diligence, the costs of the threats action being reserved, or made costs in the infringement action (*c*).

(*s*) *Sharp* v. *Brauer*, 3 R. P. C. 193; and see *Metropolitan Gas Meters Co.* v. *British and Foreign, etc., Light Controlling Co.*, (1913) 1 Ch. 150; 82 L. J. Ch. 74, where the action to restrain threats was dismissed without costs.

(*t*) See as to form of injunction, *Driffield Linseed Cake Co.* v. *Waterloo Mills Co.*, 31 C. D. 639, 644; 55 L. J. Ch. 391; *Montain* v. *Parker*, (1903) 20 R. P. C. 774, and as to damages, *Ungar* v. *Sugg*, 8 R. P. C. 385; 9 R. P. C. 113; *Skinner* v. *Shew & Co.*, (1894) 2 Ch. 581; 63 L. J. Ch. 826; *Montain* v. *Parker*, *supra*.

(*u*) *Challender* v. *Royle*, 36 C. D. p. 436; 56 L. J. Ch. 995.

(*x*) *Wilson* v. *Church Engineering Co.*, 2 R. P. C. 175.

(*y*) *Société Anonyme* v. *Tilghman*, 25 C. D. 1; 53 L. J. Ch. 1.

(*z*) *Challender* v. *Royle*, *Société Anonyme* v. *Tilghman*, *supra*. But see *Walker* v. *Clarke*, 56 L. J. Ch. 239; 56 L. T. 1.

(*a*) *Barney* v. *United Telephone Co.*, 28 C. D. p. 397; 32 W. R. 576; *Berliner* v. *Edison*, 16 R. P. C. 338; but see *Walker* v. *Clarke*, *supra*.

(*b*) See cases note (*r*), *supra*.

(*c*) See *Mackie* v. *Solio Laundry Co.*, 8 R. P. C. 465; *Edlin* v. *Pneumatic Tyre and Booth's Cycle Co.*, 10 R. P. C. 316; *Montain* v. *Parker*,

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False statements as to parliamentary candidates.

By the Corrupt and Illegal Practices Prevention Act, 1895 (*d*), it is provided (in effect) that any person who, or the directors of any body or association corporate which, before or during any parliamentary election, shall, for the purpose of affecting the return of any candidate, make or publish any false statement of fact in relation to the personal character or conduct of such candidate, may be restrained by interim or perpetual injunction from any repetition of such false statement or any false statement of a similar character in relation to such candidate, and for the purpose of granting an interim injunction *primâ facie* proof of the falsity of the statement will be sufficient.

(1903) 20 R. P. C. 774; *Wrightson* v. *Taylor*, (1907) 24 R. P. C. 347; *Craig* v. *Dowding*, (1908) 98 L. T. 231; 25 R. P. C. 259; *Cars* v. *Bland Light Syndicate*, (1911) 28 R. P. C. 40; see *Metropolitan Gas Meters Co.* v. *British and Foreign, etc., Light Controlling Co.*, (1913) 1 Ch. 150; 82 L. J. Ch. 74.

(*d*) 58 & 59 Vict. c. 40, ss. 1, 3; see *Bayley* v. *Edmunds*, 11 T. L. R. 537; and *Ellis* v. *National Union of Conservative Associations*, 44 S. J. 750.

CHAPTER XIII.

INJUNCTIONS AGAINST EXECUTORS.

If an executor or administrator through misconduct (*a*), insolvency (*b*), or bankruptcy (*c*), is bringing the property of the deceased into danger, an injunction will be granted to restrain him from getting in the assets, and a receiver will be appointed. If, however, a testator has selected an insolvent debtor as his executor, with full knowledge of his insolvency, the Court will not, on the bare fact of the insolvency alone, interfere and appoint a receiver (*d*); but where a person appointed executor becomes bankrupt after the date of the will (*e*), or after the death of the testator, the Court may restrain him from further acting, and if there is a co-executor who is willing to act, it is not necessary to appoint a receiver (*f*). The circumstance that an executor is poor and in mean circumstances, is not a sufficient ground for the interference of the Court (*g*), but an injunction will be granted where an executor or administrator is proved to be of bad character, drunken habits, and great poverty (*h*), or where there is evidence that he is not in a situation to be trusted with the management of the deceased's estate (*i*).

Parting with assets.

The Court will not restrain an executor from parting with the assets unless a case of past or probable misapplication of

(*a*) *Anon.*, 12 Ves. 5; *Harrison* v. *Cockerell*, 3 Mer. 1; *Colebourne* v. *Colebourne*, 1 C. D. 690; 45 L. J. Ch. 749.

(*b*) *Scott* v. *Becher*, 4 Price, 346; 18 R. R. 722; *Mansfield* v. *Shaw*, 3 Madd. 100; 18 R. R. 201.

(*c*) *Gladdon* v. *Stoneman*, 1 Madd. 143, n.; *Utterson* v. *Mair*, 2 Ves. 97; *Re Johnson*, 1 Ch. 325.

(*d*) *Stanton* v. *Carron Co.*, 18 Beav. p. 161; 23 L. J. Ch. 299; *Oldfield* v. *Cobbold*, 4 L. J. (N. S.) Ch. 272.

(*e*) *Langley* v. *Hawk*, 5 Madd. 46.

(*f*) *Bowen* v. *Phillips*, (1897) 1 Ch. 174; 66 L. J. Ch. 165.

(*g*) *Hawthornthwaite* v. *Russell*, 2 Atk. 126; S. C. Barnard, Ch. 334; *Howard* v. *Papera*, 1 Madd. 142; *Anon.*, 12 Ves. 5.

(*h*) *Everett* v. *Prythergh*, 12 Sim. p. 365; 11 L. J. Ch. 54; 56 R. R. 68.

(*i*) *Oldfield* v. *Cobbett*, 4 L. J. (N. S.) Ch. 271.

them has been made out. Thus, when an annuity secured by a warrant of attorney had been granted, the Court would not, at the suit of the annuitant, restrain the executor of the grantor from paying simple contract debts before setting apart a fund to answer the future payment of the annuity (*k*). So also, where the only assets of a testator consisted of a devised real estate, which was liable to his bond for securing an annuity, and before the annuity had fallen into arrear the annuitant instituted a suit, alleging waste, and sought to restrain the executrix from selling or mortgaging the real estate, the Court refused to interfere (*l*). The principle upon which these cases proceeded was, that until an annuity is actually due there is no legal title, and the liability is only in contingency (*m*). Where, however, the liability in future is certain, the case is different, and the assets may not be parted with (*n*). But the Court will not interfere by injunction in favour of a creditor, unless it is shown that the assets are being wasted, or are in serious danger; nor will the Court interfere with the executor's right of retainer or of preferring a particular creditor (*o*). An injunction may be had to restrain an executor *de son tort* from parting with assets (*p*).

Injunction against executor intermeddling with the estate before probate.

An injunction may be granted before probate on the application of a person appointed executor to restrain another person appointed co-executor from intermeddling with the estate and improperly dealing with it before probate (*q*).

Injunction to restrain payment of legacy.

In a recent case (*r*), an injunction was granted to restrain executors from paying, and a legatee from receiving, a legacy, the legatee having gone out of the jurisdiction, and not having complied with an order for payment of costs which had been made against him.

(*k*) *Read* v. *Blunt*, 5 Sim. 567.

(*l*) *Norman* v. *Johnson*, 29 Beav. 77.

(*m*) Ib.

(*n*) *King* v. *Malcott*, 9 Ha. 692; 22 L. J. Ch. 157; 89 R. R. 631; *Atkinson* v. *Gray*, 1 Sm. & G. 577. See *Re Hall*, (1903) 2 Ch. p. 235; 72 L. J. Ch. 554; *Re King*, (1907) 1 Ch. p. 75; 76 L. J. Ch. 44.

(*o*) *Re Wells*, *Malony* v. *Brooks*, 45 C. D. 569; 59 L. J. Ch. 810; *Re Stevens*, *Cooke* v. *S.*, (1898) 1 Ch. 173; 67 L. J. Ch. 118.

(*p*) See *Re Lovett*, 3 C. D. 198, 206; 45 L. J. Ch. 768; *Brend* v *Mitson*, 45 L. J. P. 41; 24 W. R. 524.

(*q*) *Re Moore*, 13 P. D. 36; 57 L. J. P. 37.

(*r*) *Bullus* v. *Bullus*, (1910) 102 L. T. 399; 26 T. L. R. 330.

CHAPTER XIV.

INJUNCTIONS AGAINST TRUSTEES.

A TRUSTEE may not use the powers which the trust confers on him at law, except for the legitimate purposes of the trust. If he attempt to do so, the Court will restrain him by injunction (*a*).

Injunction to restrain improper sale by trustee.

In *Pechel* v. *Fowler* (*b*), a case in the Exchequer, it is said to have been held that a *cestui que trust* could not restrain an imprudent sale by a trustee for sale, because, as he might proceed against the trustee for the consequential damage, the injury was not irreparable, but Sir John Leach, under similar circumstances, granted an injunction (*c*), and other authorities show that the jurisdiction rests, not upon the irremediable nature of the mischief, but upon the breach of trust (*d*).

When a sale of trust property is conducted in such a manner, as to constitute as between the trustees, having the power of sale, and the *cestui que trust*, a breach of trust, the Court will at the suit of the *cestui que trust* restr in both the purchaser and the trustees from completing the sale). The smallness of the interest of the plaintiff and the fact that she was an infant, and that the suit might have been instituted from other motives, were held not to be sufficient reasons for refusing an injunction (*f*).

By the Trustee Act, 1893 (*g*), it is provided, in effect, that

(*a*) *Balls* v. *Strutt*, 1 Ha. 146; *Att.-Gen.* v. *Welsh*, 4 Ha. 572; 67 R. R. 152; *M'Fadden* v. *Jenkyns*, 1 Ph. 153; 12 L. J. Ch. 146; 65 R. R. 354; *Marshall* v. *Sladden*, 7 Hare, 128; 4 De G. & Sm. 468; 19 L. J. Ch. 57; 82 R. R. 159; *Rigall* v. *Foster*, 18 Jur. 39 (improper mortgage).

(*b*) 2 Anst. 549; 3 R. R. 627.

(*c*) *Anon.*, 6 Madd. 10.

(*d*) *Att.-Gen.* v. *Corporation of Liverpool*, 1 M. & C. p. 210; 43 R. R. 176; *Balls* v. *Strutt*, *supra*.

(*e*) *Dance* v. *Goldingham*, 8 Ch. 902; 42 L. J. Ch. 777.

(*f*) *Dance* v. *Goldingham*, 8 Ch. 902· 42 L. J. Ch. 777; see *Grove* v. *Search*, (1906) 22 T. L. R. 290.

(*g*) 56 & 57 Vict. c. 53, s. 14. This section only applies to sales

no sale made by a trustee shall be impeached by a beneficiary upon the ground that any of the conditions are unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate; and that no sale made by a trustee shall, after execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions were unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee.

Sales under the Settled Land Acts.

By the Settled Land Act, 1882 (*h*), a tenant for life in exercising any power under the Act, must have regard to the interests of all parties entitled under the settlement, being deemed to be in the position and to have the duties and liabilities of a trustee for such parties, according to their rights as created by the settlement (*i*). The Court cannot, however, as a general rule, restrain a tenant for life from selling under the Act, so long as he acts *bonâ fide*, even though he sell from mere caprice, or whim, or to gain some personal benefit (*k*), nor will the Court restrain a sale by trustees at the request and for the benefit of the tenant for life, on merely speculative evidence by the remaindermen that the estate will increase in value in the future (*l*). But the Court will restrain a tenant for life from selling under the Act at so gross an undervalue as to be evidence of fraud (*m*). So also the Court will restrain a tenant for life from mortgaging a heavily incumbered estate under sect. 11 of the Act of 1890 (*n*) for the sake of preserving it, if by so doing the interests of annuitants or other parties interested under the settlement will be sacrificed (*o*). So also the Court will

made after the 24th December, 1888; see *Grove* v. *Search*, *supra*.

(*h*) 45 & 46 Vict. c. 38, s. 53.

(*i*) *In re Lacon*, (1911) 2 Ch. p. 23; 80 L. J. Ch. 610.

(*k*) *Wheelwright* v. *Walker*, 23 C. D. 759, 762; 52 L. J. Ch. 274; *Hampden* v. *Earl of Buckinghamshire*, (1893) 2 Ch. 535, 544; 62 L. J. Ch. 643; *Re Richardson*, (1900) 2 Ch. p. 791; 69 L. J. Ch. 804.

(*l*) *Thomas* v. *Williams*, 24 C. D. 558; 52 L. J. Ch. 603.

(*m*) *Wheelwright* v. *Walker*, *supra*.

(*n*) 53 & 54 Vict. c. 69.

(*o*) *Hampden* v. *Earl of Buckinghamshire*, (1893) 2 Ch. 531; 62 L. J. Ch. 643. See, as to this decision, *Re Richardson*, (1900) 2 Ch. 778; 69 L. J. Ch. 804.

restrain a tenant for life from directing the trustees to make an improper or undesirable investment, though it may be within the description of the investments authorised by the Act (*p*).

Parties.

A man who has a common interest with others in a trust fund, or trust estate, is entitled to sue on behalf of himself and the others, for the protection of the property, by injunction (*q*).

Enforcing injunction against new trustees.

Where an injunction has been granted against trustees and new trustees are appointed who with knowledge of the order do the act restrained by the injunction, they will be committed for contempt (*r*).

Voluntary settlements.

If a voluntary settlement be binding on the settlor, an injunction may be had to restrain the commission of any act by which the settlement may be defeated (*s*). A mere trust for the payment of debts, executed by a man behind the backs of his creditors, and without communicating with them, is not binding on the debtor, but he may, in general, revoke the authority given to the trustees, who are merely his agents (*t*). In a case where a man, having executed such a deed, afterwards varied the trusts of the deed, the Court would not interfere at the suit of a creditor under the first deed to restrain the trustees from executing the subsequent trusts (*u*). The case, however, is different if the creditor is a party to the arrangement (*x*), or if, though not a party to the arrangement,

(*p*) *Re Hunt's Settled Estates*, (1905) 2 Ch. 418; 74 L. J. Ch. 759; S. C., (1906) 2 Ch. 11; 75 L. J. Ch. 496. See S. L. Act, 1882, sect. 22, sub-sect. 2; and see *Re Lord Coleridge's Settlement*, (1895) 2 Ch. 704; 73 L. T. 206; *Re Hotham*, (1901) 2 Ch. 790; 71 L. J. Ch. 68; S. C., (1902) 2 Ch. 575; 71 L. J. Ch. 789; *In re Sir Robert Peel's Settled Estates*, (1920) 1 Ch. 389; 79 L. J. Ch. 233.

(*q*) *Scott* v. *Becher*, 4 Price, 346; 18 R. R. 722; *Dance* v. *Goldingham*, 8 Ch. 902; 42 L. J. Ch. 777. See R. S. C. Order 16, rr. 36, 37.

(*r*) *Avory* v. *Andrews*, 51 L. J. Ch. 414; 30 W. R. 565.

(*s*) *Mackenzie* v. *Mackenzie*, 16 Ves. 372.

(*t*) *Walwyn* v. *Coutts*, 3 Mer. 707; 3 Sim. 14; 30 R. R. 117; *Bill* v. *Cureton*, 2 M. & K. p. 511; 4 L. J. (N. S.) Ch. 98; 39 R. R. 258; *Garrard* v. *Lauderdale*, 2 R. & M. 451; 30 R. R. 105; *Johns* v. *James*, 8 C. D. 744; 47 L. J. Ch. 853; *Priestley* v. *Ellis*, (1897) 1 Ch. p. 501; 66 L. J. Ch. 240; *New & Co.'s Trustee* v. *Hunting*, (1897) 2 Q. B. p. 30; 66 L. J. Q. B. 554.

(*u*) *Walwyn* v. *Coutts*, *supra*.

(*x*) *M'Kinnon* v. *Stewart*, 1 Sim. (N. S.) 76; 20 L. J. Ch. 49; 89

he has been told by the debtor that he may look to the property comprised in the deed for the payment of his demand (*y*); or if the trust in favour of creditors is to come into operation only after the death of the settlor (*z*). Where a man creates a trust for particular persons, and not merely for his creditors generally, it cannot be revoked (*a*).

Trust deeds for religious bodies.

The Court will enforce by injunction trust deeds for religious bodies, or for the purposes of education. If a living or the right of electing the incumbent of a parish, is vested in trustees, or a particular body, and an improper appointment is made, the Court will restrain by injunction, the trustees from presenting the person so appointed to the bishop for institution (*b*), and will also restrain the person so appointed, or any other person than the person properly appointed, from performing divine service in the church (*c*). So, also, if a man be elected or appointed minister of a dissenting chapel, improperly or not in the mode provided for by the deed of trust, the Court will, on a proper application being made, restrain him by injunction from officiating as pastor or intermeddling with the services and disturbing a pastor duly elected in the performance of divine service (*d*). So, also, if the minister or pastor of a chapel has been improperly dismissed, the Court will restrain the governing body from hindering him in the discharge of his office (*e*).

R. R. 24; *Montefiore* v. *Browne*, 7 H. L. C. 241; 115 R. R. 132.

(*y*) *Acton* v. *Woodgate*, 2 M. & K. 492; 3 L. J. (N. S.) Ch. 83; 39 R. R. 251; *Harland* v. *Binks*, 15 Q. B. 713; 20 L. J. Q. B. 126; 81 R. R. 770; *Siggers* v. *Evans*, 5 E. & B. 367; 24 L. J. Q. B. 305; *Johns* v. *James*, 8 C. D. 744; 47 L. J. Ch. 853.

(*z*) *Synott* v. *Simpson*, 5 H. L. C. 145; *Re Fitzgerald*, 37 C. D. 18, 25; 57 L. J. Ch. 594; *Priestley* v. *Ellis*, (1897) 1 Ch. 501; 66 L. J. Ch. 240.

(*a*) *Godfrey* v. *Poole*, 13 A. C. 497; 57 L. J. P. C. 78; *New & Co.'s Trustee* v. *Hunting*, (1897) 2 Q. B. 19, 25; 66 L. J. Q. B. 554; cf. *In re Coseus*, (1913) 2 Ch. 478.

(*b*) *Carter* v. *Cropley*, 8 De G. M. & G. 680, 698; 26 L. J. Ch. 246; 114 R. R. 279.

(*c*) *Att.-Gen.* v. *Earl of Powis*, Kay, 186; 101 R. R. 571; *Milligan* v. *Mitchell*, 1 M. & K. 446; 3 M. & C. 72; 45 R. R. 218.

(*d*) *Perry* v. *Shipway*, 4 De G. & J. 353; 28 L. J. Ch. 660; 124 R. R. 286; *Cooper* v. *Gordon*, 8 Eq. 249; 38 L. J. Ch. 489; cf. *Foley* v. *Wontner*, 2 J. & W. p. 247; 22 R. R. 110; *Leslie* v. *Birnie*, 2 Russ. 114; 26 R. R. 14.

(*e*) *Daugars* v. *Rivaz*, 28 Beav. 233; 29 L. J. Ch. 685; *Att.-Gen.* v. *Daugars*, 33 Beav. 621. See

Ministers.

If ministers of dissenting chapels hold tenets differing from those of the founders, they will be restrained by injunction from preaching (*f*), or from remaining in possession of the chapel (*g*), although elected by a majority of the trustees or the congregation, as it is not in their power to alter the designed objects of the institution. So, also, the Court will, upon a proper case being made out, restrain a chapel from being used or enjoyed by persons not contemplated by the deed of foundation, and will restrain the minister from admitting to communion persons not contemplated by the deed of foundation. But if the majority of the congregation, or the trustees, have the power of varying the trusts, or doctrines, the Court will not interfere (*h*).

Removal of Schoolmaster.

The mode set forth in the instrument creating the trust, or required by statute (*i*), with respect to the removal of a schoolmaster, must in all cases be observed (*k*).

Where trustees of a grammar-school have by the foundation deed power to remove a schoolmaster at their discretion, they may at any time remove him, so long as they do not act from corrupt or improper motives, and it seems they need not assign any reasons (*l*). But if they remove him for mis-

Dean v. *Bennett*, 9 Eq. 625; 39 L. J. Ch. 674; 6 Ch. 490; 40 L. J. Ch. 452; *Hayman* v. *Governors of Rugby School*, 18 Eq. 60, 71; 43 L. J. Ch. 834. As to the right of minister to withdraw his resignation, see *Nickson* v. *Dolphin*, (1911) 56 S. J. 123.

(*f*) *Att.-Gen.* v. *Welsh*, 4 Ha. 572; 67 R. R. 152; *Att.-Gen.* v. *Munro*, 2 De G. & S. 122; 79 R. R. 151; *Att.-Gen.* v. *Murdock*, 1 De G. M. & G. 86; 21 L. J. Ch. 694; 82 R. R. 172; *Shore* v. *Wilson*, 9 Cl. & Fin. 355; 57 R. R. 2; *Att.-Gen.* v. *Anderson*, 57 L. J. Ch. 547; *Gen* v. *Gregg*, 21 C. D. 513; 51 L. J. Ch. 783.

(*g*) *Broom* v. *Summers*, 11 Sim. 353; 10 L. J. Ch. 71; 54 R. R. 396.

(*h*) *Att.-Gen.* v. *Gould*, 28 Beav. 485; 30 L. J. Ch. 77; *Att.-Gen.* v. *Etheridge*, 32 L. J. Ch. 161. As to the power of a majority of the trustees of a charity to bind the minority, see *Re Whiteley*, (1910) 1 Ch. pp. 607, 608; 79 L. J. Ch. 405.

(*i*) See the Charitable Trusts Acts, 1853 and 1860 (16 & 17 Vict. c. 137, s. 22; 23 & 24 Vict. c. 136, ss. 2, 6, 14); the Endowed Schools Acts, 1869 and 1908 (32 & 33 Vict. c. 56, s. 22; 8 Edw. 7, c. 39, s. 1); the Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 2; and the Education Act, 1902 (2 Edw. 7, c. 42), s. 7 (1) (c).

(*k*) See *Crisp* v. *Holden*, (1910) 54 S. J. 784; *Smith* v. *Macnally*, (1912) 1 Ch. 816; 81 L. J. Ch. 483.

(*l*) *Ex parte Holland*, *Buxton School*, 11 Jur. 581; *Re Fremington*

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conduct, he must be informed of the charges brought against him, and have an opportunity of defending himself (*m*).

The Court will prevent a corrupt or irregular exercise of powers of removal. Thus, where the trustees, or managers of a school with powers to remove a schoolmaster, deprive him of his office from improper motives, *e.g.*, because he has voted for a certain candidate at a particular election (*n*), or arbitrarily, without giving him an opportunity to answer the charges against him (*o*), or irregularly, by not giving him the proper notice (*p*), or by not obtaining the consent of the necessary authorities, to his dismissal (*q*), or by removing him at an irregularly constituted meeting of the governing body (*r*), the Court will grant an injunction. In a case where power had been given to trustees, under a scheme of the Court for the regulation of a grammar-school which had been founded by King Edward the Sixth, to remove the schoolmaster "upon such grounds as they should in their discretion in the due exercise and execution of the powers and trusts reposed in them deem just," Lord Langdale, being of opinion that the scheme of regulation did not confer on the trustees a power to dismiss the master arbitrarily upon any grounds they might deem just, free from the control of the Court, granted an injunction to restrain the trustees from enforcing the dismissal and ejecting the master (*s*).

Charity Commissioners, consent of.

A schoolmaster who seeks the aid of the Court against the

School, 10 Jur. 512; 11 Jur. 421; 77 R. R. 879; *Reg.* v. *Darlington School*, 6 Q. B. 682; 14 L. J. Q. B. 67; 66 R. R. 521; *Dean* v. *Bennett*, 6 Ch. 489; 40 L. J. Ch. 452; *Hayman* v. *Governors of Rugby School*, 18 Eq. p. 68; 43 L. J. Ch. 834; and see *Lane* v. *Norman*, (1891) 61 L. J. Ch. p. 152.

(*m*) *Fisher* v. *Jackson*, (1891) 2 Ch. 84; 60 L. J. Ch. 482. See *Green* v. *Howell*, (1910) 1 Ch. p. 504; 79 L. J. Ch. p. 557.

(*n*) *Dummer* v. *Corporation of Chippenham*, 14 Ves. 245.

(*o*) *Re Phillip's Charity*, 9 Jur. (N. S.) 959; 72 R. R. 802; *Fisher* v. *Jackson*, (1891) 2 Ch. 84; 60 L. J. Ch. 482.

(*p*) *Crisp* v. *Holden* (1910), 54 S. J. 784. See *Bowen* v. *Young*, (1904) 48 S. J. 733.

(*q*) *Smith* v. *Mocnally*, (1912) 1 Ch. 816; 81 L. J. Ch. 483.

(*r*) *Lane* v. *Normon*, (1892) 61 L. J. Ch. 149; 66 L. T. 83. See *Bowers* v. *Young*, (1904) 48 S. J. 733; cf. *Meyers* v. *Hennell*, (1912) 2 Ch. 256; 81 L. J. Ch. 794.

(*s*) *Willis* v. *Childe*, 13 Beav. 117 20 L. J. Ch. 113; 88 R. R. 440.

trustees of a charity to restrain them from removing him from his office need not obtain the sanction of the Charity Commissioners (*t*), unless the claim to such relief involves the administration of the trust (*u*). On the other hand, the governors of a charity school who have dismissed their schoolmaster may bring an action to restrain him from teaching at the school and remaining in possession of the school-house, without obtaining the sanction of the Charity Commissioners (*x*).

Receiver and injunction on disagreement of trustees or on breaches of trust.

Where trustees disagree among themselves, so that the trust cannot be properly carried on without the assistance of the Court, a receiver will be appointed (*y*). So also, where one of the trustees is excluded by the others from taking part in administering the trust, this is a ground for the appointment of a receiver (*z*). So also, where a trustee has been guilty of breaches of trust, an injunction may be granted to restrain him from receiving the trust funds, and a receiver appointed in his stead to receive the same (*a*).

(*t*) Or the consent of the Board of Education. See the Board of Education Act, 1899 (62 & 63 Vict. c. 33, s. 2 (2), as to transfer to Board of Education of the powers of the Charity Commissioners in matters relating to education.

(*u*) *Rendell* v. *Blair*, 45 C. D. 139; 59 L. J. Ch. 641; *Fisher* v. *Jackson*, (1891) 2 Ch. 84; 60 L. J. Ch. 482; *Rooke* v. *Dawson*, (1895) 1 Ch. pp. 487, 488; 65 L. J. Ch. p. 304.

(*x*) *Holme* v. *Guy*, 5 C. D. 901; 46 L. J. Ch. 223; *Rooke* v. *Dawson*, (1895) 1 Ch. 480; 65 L. J. Ch. 304; or the consent of the Board of Education. See note (*t*), *supra*.

(*y*) *Wilson* v. *Wilson*, 2 Keen, 249; 44 R. R. 238; *Hart* v. *Denham*, (1871) W. N. 2; *Swale* v. *Swale*, 22 B. 584; 111 R. R. 495.

(*z*) *Swale* v. *Swale*, *supra*.

(*a*) *Snare* v. *Baker*, 13 Jur. 203; 85 R. R. 793.

CHAPTER XV.

INJUNCTIONS BETWEEN PARTNERS.

THE Court has jurisdiction to restain by injunction one or more members of a partnership firm from doing acts inconsistent with the terms of the partnership agreement, or with the duties of a partner.

Injunction granted although dissolution not claimed.

An injunction will not be refused simply because a dissolution of partnership is not sought (*a*). Where, accordingly, a member of a partnership firm who had been suffering from temporary insanity had recovered, but was excluded by his co-partners from the management of the affairs of the partnership, they were restrained from preventing him from transacting the business of the partnership as a partner (*b*). So also, disputes having arisen among the partners in a firm, formed for twenty-one years and determinable on twelve months' notice by either party, one of the partners was restrained from excluding his co-partner from the partnership business, and from obstructing or interfering with the plaintiff in the exercise or enjoyment of his right under the partnership articles (*c*), and from applying any of the funds or effects of the partnership, otherwise than in the ordinary course of business, though no dissolution was sought (*d*). So also one partner was restrained from pulling down [illegible]ering, or adding to the partnership premises without the [illegible]t of the other partners (*e*). So also, where a partner [illegible]erm

Exclusion of partner.

Improper application of funds.

Alteration of firm premises.

(*a*) *Fairthorne* v. *Weston*, 3 Ha. 387; 13 L. J. Ch. 263; 64 R. R. 342; *Richardson* v. *Hastings*, 7 Beav. 301; 13 L. J. Ch. 129; 64 R. R. 86; *Watney* v. *Trist*, 45 L. J. Ch. 412; *J.* v. *S.*, (1894) 3 [illegible]. p. 74; 63 L. J. Ch. 615.

(*b*) *Anon.*, 2 K. & J. 441; 110 R. R. 308. In *J.* v. *S.*, *supra*, a partner of unsound mind was restrained from inte[illegible]g in the conduct of the partnership affairs.

(*c*) *Hall* v. *Hall*, 12 Beav. 414; 3 Mac. & G. 79; 20 L. J. Ch. 585; 87 R. R. 15.

(*d*) *Hall* v. *Hall*, *supra*. See *Gardner* v. *M'Cutcheon*, 4 Beav. 534; 55 R. R. 154.

(*e*) *Elmslie* v. *Beresford*, (1873) W. N. 152.

had not expired, one of the partners who purported to retire from the partnership and entered into a new partnership for carrying on business of the same character and nature was restrained from carrying on such business with his new partners, or with any other person than his old co-partners, until the expiration of the term; and from publishing or circulating any notice of the dissolution of the old firm, before the expiration of the term for which it had been entered into (*f*). So also a partner was restrained from using the firm's name in a business carried on by him on his own account, though such business was so far beyond the scope of that of the firm that he was not bound to account for the benefit derived from it (*g*).

Carrying on business with other persons.

and use of firm name.

So also where partnership articles provided that proper books of account should be kept by the managing partners and that each partner should have free access to and liberty to examine and copy or take extracts from any of the books and writings of the partnership at all reasonable times, it was held that under this provision (as well as under sect. 24, sub-sect. 9 of the Partnership Act, 1890) a partner was entitled to have the books and accounts examined on his behalf by an agent appointed by him for the purpose, provided that the agent was a person to whom no reasonable objection could be taken by the other partners, the agent undertaking not to make use of the information which he should thus acquire except for the purpose of confidentially advising his principal, and an injunction restraining the defendants from preventing the exercise of this right by the plaintiff was accordingly granted (*h*).

Preventing access to firm books.

So also the Court will restrain by injunction the exercise of a power of expelling a partner, where the power is not exercised *bonâ fide*, or in accordance with the terms of the

Expulsion of partner.

(*f*) *England* v. *Carling*, 8 Beav. 129; 68 R. R. 39.

(*g*) *Aas* v. *Benham*, (1891) 2 Ch. 244; 65 L. T. 25. See the Partnership Act, 1890, s. 29.

(*h*) *Bevan* v. *Webb*, (1901) 2 Ch. 59; 70 L. J. Ch. 536. See *Norey* v. *Keep*, (1909) 1 Ch. p. 564; 78 L. J. Ch. 334; and sect. 6, sub-sect. 1 of 7 Edw. 7, c. 24, as to the right of a limited partner and his agent to inspect the firm books; *Davies* v. *Gas Light and Coke Co.*, (1909) 1 Ch. 248, 708; 78 L. J. Ch. 445, a case under the Companies Clauses Act, 1845.

partnership deed (*i*). But if the power is exercisable at the will and pleasure of the other partner, the Court will not interfere in the absence of *mala fides* (*k*). Where, however, the power is exercisable in the event of a partner's misconduct, the Court will inquire whether it has been properly exercised (*l*), and when his co-partners are the tribunal to determine the question of expulsion, will restrain them from expelling him if he has not been given notice of the grounds of complaint against him, and had an opportunity of defending himself (*m*). But where the question whether the partner is or is not properly expelled has to be determined, not by his co-partners, but by the Court, or arbitration, the expelling partners are under no obligation to inform him of the charges against him, or to give him an opportunity of being heard before serving the notice of expulsion (*n*).

In a case where there was power to expel a partner for "any flagrant breach of any of the duties of a partner," the Court refused to grant an interlocutory injunction restraining the expulsion of the plaintiff who had been convicted of having travelled without a ticket with intent to avoid payment, holding that such conduct was likely to do serious injury to the partnership business, whereas the exclusion of the plaintiff would not inflict irreparable injury upon him and he would have his remedy, if at the trial it should be held that he ought not to have been excluded (*o*).

Injunction generally not granted where partnership at will and dissolution not claimed.

The Court will not, in general, interfere by injunction in the case of partnerships determinable at will if a dissolution is not prayed, for supposing the Court to interfere, the defe

(*i*) See *Blisset* v. *Daniel*, 10 Hare, 493; 90 R. R. 454; *Wood* v. *Woad*, L. R. 9 Ex. 190; 43 L. J. Ex. 153; *Russell* v. *Russell*, 14 C. D. 471; 49 L. J. Ch. 268; *Carmichael* v. *Evans*, (1904) 1 Ch. p. 490; 73 L. J. Ch. 329; *Green* v. *Howell*, (1910) 1 Ch. p. 504; 79 L. J. Ch. 549.

(*k*) *Blisset* v. *Daniel*, *supra*; *Russell* v. *Russell*, 14 C. D. pp. 479, 480; 49 L. J. Ch. 268.

(*l*) *Wood* v. *Woad*, L. R. 9 Ex. p. 196; 43 L. J. Ex. 153. *Cooper* v. *Page*, 34 L. T. 90; *Green* v. *Howell*, *supra*.

(*m*) See *Green* v. *Howell*, (19 1 Ch. pp. 500, 504; 79 L. J. 549.

(*n*) *Green* v. *Howell*, (1910) 1 495; 79 L. J. Ch. 549, overrul on this point *Barnes* v. *You* (1898) 1 Ch. 414; 67 L. J. Ch.

(*o*) *Carmichael* v. *Evans*, (19 1 Ch. 486; 73 L. J. Ch. 329.

dant might immediately dissolve the partnership (*p*). But the Court will not decline to interfere where the act complained of tends to the destruction of the partnership property, or where its interference might be of service in preventing the doing of an illegal act (*q*).

Injunctions during or after an action for dissolution.

In an action for dissolution, a partner will be restrained from improperly obstructing the partnership business (*r*); from interfering with the receiver and manager appointed by the Court to carry on the business with a view to a sale (*s*); from accepting or negotiating bills for other than partnership purposes (*t*); from drawing, accepting, indorsing, or negotiating bills of exchange in the partnership name (*u*); from getting in debts due to the firm (*x*); from drawing cheques in the name of the firm or taking any monies out of the capital of the partnership (*y*); from continuing to keep away from the firm a partnership book (*z*); from tampering with the employees of the business, and inducing them to enter the service of a firm which is being started in opposition (*a*), and generally, from doing an intentional serious damage to the property of the firm (*b*); so also a surviving partner will be restrained from improperly ejecting the representatives of his deceased co-partner (*c*); and from dispos-

(*p*) See *Peacock* v. *Peacock*, 16 Ves. 49; 10 R. R. 138.

(*q*) See *Miles* v. *Thomas*, 9 Sim. 606, 609; 47 R. R. 320.

(*r*) *Charlton* v. *Poulter*, 19 Ves. p. 147, n.; *Smith* v. *Jeyes*, 4 Beav. 503; 55 R. R. 149; see *Dixon* v. *Dixon*, (1904) 1 Ch. 161; 73 L. J. Ch. 103.

(*s*) *Dixon* v. *Dixon*, *supra*.

(*t*) *Williams* v. *Bingley*, 2 Vern. 278, n.

(*u*) *Jervis* v. *White*, 7 Ves. 413; 6 R. R. 26; *Hood* v. *Aston*, 1 Russ. 412; 25 R. R. 93. In *Jervis* v. *White* and *Hood* v. *Aston*, the injunction was extended to restrain indorsees for value with constructive notice from negotiating the securities.

(*x*) *Read* v. *Bowers*, 4 Bro. C. C. 440.

(*y*) *Lemann* v. *Berger*, 34 L. T. 235.

(*z*) *Charlton* v. *Poulter*, 19 Ves. 147, n.; *Taylor* v. *Davis*, 7 L. J. Ch. 179; *Greatrex* v. *Greatrex*, 1 De G. & S. 692; 75 R. R. 251. See Partnership Act, 1890, s. 24 (9).

(*a*) *Dixon* v. *Dixon*, (1904) 1 Ch. 161; 73 L. J. Ch. 103.

(*b*) *Marshall* v. *Watson*, 25 Beav. 501; *Turner* v. *Major*, 3 Giff. 442; 5 L. T. 600; *Dixon* v. *Dixon*, (1904) 1 Ch. 161; 73 L. J. Ch. 103.

(*c*) *Elliott* v. *Brown*, 3 Sw. 489, n.; *Hawkins* v. *Hawkins*, 4 Jur. N. S. 1045.

ing of, or getting in, the partnership assets, if he has already made an improper use of the monies received by him (*d*).

Injunction against partner of unsound mind.

In a case in which an action was pending for the dissolution of a partnership on the ground that the defendant was of unsound mind, the Court granted an injunction to restrain the defendant from interfering in the conduct of the partnership affairs so as to injure the business and assets of the firm (*e*).

Arbitration proceedings when restrained.

An injunction will in a proper case be granted to restrain a partner from proceeding with an arbitration if an action is pending impeaching the instrument which contains the agreement to refer (*f*). But the Court will not restrain a partner from proceeding to arbitration where it is satisfied that the result of the arbitration will be merely futile and productive of no injury to the plaintiff (*g*).

After dissolution either partner may in the absence of agreement carry on the same business.

After the dissolution of a partnership any one of the partners may, in the absence of express agreement, carry on the same business in the old neighbourhood (*h*). Though a retiring partner may have assigned his interest and goodwill in the business to his co-partner, an agreement not to carry on the same trade will not be implied (*i*), unless there was an understanding to that effect on the sale of the business (*k*); but a retiring partner may not recommence or carry on business in such a way as to lead people to suppose that he is the successor of the old firm (*l*). He has, however, a right to say, in the absence of express agreement, that he lately belonged to a certain firm, and may advertise the fact (*m*),

(*d*) *Hartz* v. *Schrader*, 8 Ves. 317; 7 R. R. 55.

(*e*) *J.* v. *S.*, (1894) 3 Ch. 72; 63 L. J. Ch. 615.

(*f*) *Kitts* v. *Moore*, (1895) 1 Q. B. 253, 259; 64 L. J. Q. B. 152.

(*g*) *Farrar* v. *Cooper*, 44 C. D. 323; 59 L. J. Ch. 506.

(*h*) *Cruttwell* v. *Lye*, 17 Ves. 335; 11 R. R. 98. See *Davies* v. *Hodgson*, 25 Beav. 177; 27 L. J. Ch. 449; 129 R. R. 379; *Trego* v. *Hunt*, (1896) A. C. p. 27; 65 L. J. Ch. 1; *Curl Brothers* v. *Webster*, (1904) 1 Ch. 687; 73 L. J. Ch. 540.

(*i*) Ib.

(*k*) *Harrison* v. *Gardner*, 2 Madd. 198; 17 R. R. 207. See *Trego* v. *Hunt*, (1896) A. C. p. 23; 65 L. J. Ch. pp. 10, 11.

(*l*) *Churton* v. *Douglas*, Johns. 174; 28 L. J. Ch. 841; 123 R. R. 56; *Hookham* v. *Pottage*, 8 Ch. 91; 27 L. T. 59; *Trego* v. *Hunt*, (1896) A. C. p. 27; 65 L. J. Ch. p. 11.

(*m*) *Trego* v. *Hunt*, (1896) A. C. p. 27; 65 L. J. Ch. p. 11.

or may advertise that he is no longer connected with the concern (*n*). But a retiring partner who has sold his interest in the partnership may not solicit the customers of the old firm for business (*o*), even although they may have come to him of their own accord since the sale (*p*).

Must not solicit former customers.

This restriction on soliciting former customers does not, however, apply in the case of involuntary alienation. Thus the purchaser of the goodwill of a business from the trustee in bankruptcy of a debtor, is not entitled to an injunction to restrain the debtor from soliciting the customers of his former business, even although the debtor may have joined in the assignment of the goodwill to the purchaser (*q*), nor does the restriction apply in the case of a partner who has been expelled under a provision in the articles of partnership (*r*).

Exceptions to the rule.

Upon the dissolution of a partnership, without any sale or assignment of the goodwill of the business, and without any provision as to the use of the firm name, each of the partners is entitled to carry on business under that name, provided that he does not thereby expose his former partners to risk of liability (*s*). Whether there will be any such risk, is a matter to be determined with regard to the circumstances of each case as it arises (*t*).

Right to the use of the firm name after dissolution.

Where the goodwill of a business is taken over on the dissolution of a partnership without any express stipulation against the retiring partner carrying on a similar business, he is at liberty to start in the same trade again under his own name, so long as he does not use it so as to mislead the public; but he cannot trade under the old name if it differs from his own name (*u*), and he will not be allowed to solicit

(*n*) *Bradbury* v. *Dickens*, 27 Beav. 53; 28 L. J. Ch. 667; 122 R. R. 311.

(*o*) *Trego* v. *Hunt*, (1896) A. C. 7; 65 L. J. Ch. 1; *Jennings* v. *Jennings*, (1898) 1 Ch. 378; 67 L. J. Ch. 190; *Gillingham* v. *Beddow*, (1900) 2 Ch. 242; 69 L. J. Ch. 527.

(*p*) *Curl Brothers* v. *Webster*, (1904) 1 Ch. 685; 73 L. J. Ch. 540.

(*q*) *Walker* v. *Mottram*, 19 C. D. 355; 51 L. J. Ch. 108.

(*r*) *Dawson* v. *Beeson*, 22 C. D. 504; 37 W. R. 537.

(*s*) *Chappell* v. *Griffith*, 53 L. T. 459; *Burchell* v. *Wilde*, (1900) 1 Ch. 551; 69 L. J. Ch. 314.

(*t*) *Burchell* v. *Wilde*, *supra*.

(*u*) *Churton* v. *Douglas*, Johns. 174; 28 L. J. Ch. 841; 123 R. R. 56; *Re David and Matthews*, (1899) 1 Ch. 378; 68 L. J. Ch. 185.

the customers of the old firm (*x*). Where a continuing partner is at liberty to use the trade name of his late firm, he can only do so in a way which will not cast risk or liability on his late partners (*y*).

Where the goodwill of a business is assigned, without any express assignment of the right to use the firm name, and such firm name consists of the name of the vendor with the words "and Co." added to it, the vendor runs no appreciable risk by the purchaser continuing the business under such firm name, and cannot therefore maintain an injunction to restrain such user (*z*).

In *Bradbury* v. *Dickens* (*a*), an author, who had been in partnership with a publisher, was restrained, after dissolution, from advertising that a certain publication would be discontinued, the right to use the name of the publication being partnership assets (*b*). Upon the dissolution of a partnership, and the sale of the business to one of the partners, the purchaser, where there is no agreement permitting him to use it, may be restrained from using the outgoing partner's name, as part of the style of the firm, unless the outgoing partner is dead or bankrupt (*c*), or unless it is used in such a way as not to expose the outgoing partner to risk of liability (*d*). In *Evans* v. *Hughes* (*e*), a surviving partner was restrained from carrying on business for three months after the decease of the other partner, under any style except that of the old firm, there being a stipulation in the articles of partnership that the representatives of a deceased partner might elect, within three months from his death, to take the deceased partner's share.

Sale of good will passes right to firm name, and benefit of covenant not to carry on similar business.

If the whole of a partnership concern and the goodwill of a

(*x*) *Gillingham* v. *Beddow*, (1900) 2 Ch. 242; 69 L. J. Ch. 527.

(*y*) See *Burchell* v. *Wilde*, (1900) 1 Ch. 551; 69 L. J. Ch. 314: and see also *Townsend* v. *Jarman*, (1900) 2 Ch. 698; 69 L. J. Ch. 823.

(*z*) *Townsend* v. *Jarman*, (1900) 2 Ch. 698; 69 L. J. Ch. 823.

(*a*) 27 Beav. 53; 28 L. J. Ch. 667; 122 R. R. 311.

(*b*) See *Marshall* v. *Watson*, 25 Beav. 501; 119 R. R. 509.

(*c*) *Scott* v. *Rowland*, 20 W. R. 508.

(*d*) See *Burchell* v. *Wilde*, (1900) 1 Ch. 551; 69 L. J. Ch. 314.

(*e*) 18 Jur. 691.

business have been sold, the right to the name or partnership style, as a general rule, passes with it (*f*), also the benefit of a partner's or servant's covenant, not to carry on within a certain limit of time or space a similar business to that of the partnership (*g*).

The Court does not interfere in all cases of misconduct of partners.

The Court will not interfere in all cases of misconduct to grant an injunction against one partner at the suit of another. Mere disagreements, or quarrels arising from bad temper and improprieties of conduct, are not a sufficient ground for the interference of the Court. But if a partner is conducting himself so grossly as to render it impossible for the business to be carried on in a proper manner, the Court will interfere (*h*).

When partner given exclusive management.

When partners have agreed that the management of their affairs shall be entrusted to one or more of them exclusively, the Court will not interpose, unless he or they is or are acting illegally, or in breach of the trust reposed in him or them, or has or have become insolvent (*i*).

Partner not restrained from acting merely on ground of possible loss of custom in consequence.

The Court will not interfere to restrain a partner from acting as such, merely because if he were known to be acting as partner the confidence of the public in the concern might be shaken (*k*). But in a case where a partnership was formed between several

(*f*) *Banks* v. *Gibson*, 34 Beav. 566; 31 L. J. Ch. 591; *Townsend* v. *Jarman*, (1900) 2 Ch. 698; 69 L. J. Ch. 823. As to "goodwill," see *Austen* v. *Boys*, 2 De G. & J. 626; 27 L. J. Ch. 714; 119 R. R. 264; *Trego* v. *Hunt*, (1896) A. C. 17, 23; 65 L. J. Ch. p. 10; *Inland Revenue Commissioners* v. *Muller & Co's Margarine Co.*, (1901) A. C. 223, 224; 70 L. J. K. B. p. 680; *Hill* v. *Fearis*, (1905) 1 Ch. p. 471; 74 L. J. Ch. p. 238; *Att.-Gen.* v. *Boden*, (1912) 1 K. B. 539; 81 L. J. K. B. 704. As to goodwill of a solicitor's business, see *Austen* v. *Boys*, *supra*; *Arundel* v. *Bell*, 52 L. J. Ch. 537; *Burchell* v. *Wilde*, (1900) 1 Ch. 551; 69 L. J. Ch. 314. As to goodwill of a stockbroker's business, see *Hill* v. *Fearis*, *supra*.

(*g*) *Townsend* v. *Jarman*, (1900) 2 Ch. 698; 69 L. J. Ch. 823; *Wellstead* v. *Hadley*, (1904) 21 T. L. R. 165; *Automobile Carriage Builders* v. *Sayers*, (1909) 101 L. T. 419.

(*h*) See *Goodman* v. *Whitcomb*, 1 J. & W. p. 592; 21 R. R. 244; *Smith* v. *Jeyes*, 4 Beav. 503; 55 R. R. 149; *Anderson* v. *Anderson*, 25 Beav. 190, 191; 119 R. R. 388; *Marshall* v. *Colman*, 2 J. & W. 268; 22 R. R. 116; *Baxter* v. *West*, 1 Dr. & Sm. 173; 28 L. J. Ch. 169.

(*i*) *Waters* v. *Taylor*, 15 Ves. 10; 13 R. R. 91; *Roberts* v. *Eberhardt*, Kay, p. 160; 23 L. J. Ch. 201; 101 R. R. 548; *Automatic Self Cleaning Filter Co.* v. *Cuninghame*, (1906) 2 Ch. pp. 44, 45; 75 L. J. Ch. p. 441.

(*k*) *Anon.*, 2 K. & J. 441; 110 R. R. 2.

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persons in a mail-coach business, one of the partners was restrained from supplying the horses, on the ground that his horses were so bad as to cause irreparable injury to the business of the firm (*l*).

Injunctions to restrain a man from holding out another as partner.

An injunction will be granted to restrain a person from holding out another as a partner, against the wish and without the authority of that other (*m*). So also a company was restrained from advertising a certain person as their trustee without his authority (*n*).

In a case, in which a dealer in cycles had advertised his goods in a manner which satisfied the Court that he intended the public to believe that the plaintiffs (the proprietors of *The Times* newspaper) were either the vendors, for whom he acted as manager, or were partners with him, or in some way connected with the sale of such cycles, it was held that as the plaintiffs were exposed to some risk by the unauthorised use by the defendant of the name of their newspaper, an interlocutory injunction ought to be granted restraining the defendant from in any way representing that the cycles offered by him for sale were offered for sale by the plaintiffs, and from in any way holding out *The Times* to be the owners of, or connected with his business (*o*).

A partner who seeks relief must do equity.

A partner who seeks to restrain his co-partner from violating the terms of a partnership agreement, or his duties as a partner, must be able to show that he is able and willing to perform his own part of the agreement, and has fulfilled the duties incumbent on himself (*p*). However improper the conduct of his co-partner may have been, a partner may, by his own acts, debar and preclude himself from relief in equity (*q*).

Acquiescence.

Acquiescence in the act complained of may disentitle a partner to relief against his co-partners (*r*).

(*l*) *Anderson* v. *Wallace*, 2 Moll. 540.

(*m*) See *Routh* v. *Webster*, 10 Beav. 561; 76 R. R. 211; *Bullock* v. *Chapman*, 2 De G. & S. 211; *Walter* v. *Ashton*, (1902) 2 Ch. 282, 291; 71 L. J. Ch. 839, 842.

(*n*) *Routh* v. *Webster*, 10 Beav. 561; 76 R. R. 211.

(*o*) *Walter* v. *Ashton*, (1902) 2 Ch. 282; 71 L. J. Ch. 839.

(*p*) *Const* v. *Harris*, T. & R. p. 524; 24 R. R. 108.

(*q*) *Littlewood* v. *Caldwell*, 11 Price, 97; 25 R. R. 711.

(*r*) *Glassington* v. *Thwaites*, 1

Appointment of receiver operates as an injunction.

The appointment of a receiver in partnership cases of itself operates as an injunction (*s*), though the Court in granting or refusing an order for a receiver does not act upon the same principles as when it grants or refuses an order for an injunction (*t*). An injunction may exclude one of the partners from the management of the partnership affairs, but the appointment of a receiver excludes the plaintiff as well as the defendant, the Court taking upon itself, through the receiver and manager, the management of the partnership affairs. It therefore does not follow that because the Court will grant an injunction it will also appoint a receiver, or that because it refuses to appoint a receiver it will also decline to interfere by injunction (*u*). The Court, however, will often grant an injunction as well as appoint a receiver in order to mark its sense of the impropriety of the conduct of those whom it specially restrains (*x*).

Difference of principles on which a receiver is appointed and an injunction granted.

Sim. & St. 125; 1 L. J. (O. S.) Ch. 118; 24 R. R. 153; *Clegg* v. *Edmondston*, 8 De G. M. & G. 787; 26 L. J. Ch. 673; 114 R. R. 326; *Evans* v. *Smallcombe*, L. R. 3 H. L. 256; 37 L. J. Ch. 793.

(*s*) *Evans* v. *Coventry*, 3 Drew. p. 82; 5 De G. M. & G. p. 916; 106 R. R. 290; *Baxter* v. *West*, 1 Dr. & Sm. 173; 28 L. J. Ch. 169; and see *Tyrell* v. *Painton*, (1895) 1 Q. B. p. 206; *Re The Peak Hill Goldfield Co.*, (1909) 1 K. B. p. 437; 78 L. J. K. B. p. 354 (cases of the appointment of a receiver by way of equitable execution).

(*t*) *Hall* v. *Hall*, 3 Mac. & G. 79, 85; 20 L. J. Ch. 585; 87 R. R. 15.

(*u*) *Hall* v. *Hall*, *supra*; Lindley, 6th ed. p. 568.

(*x*) *Evans* v. *Coventry*, 3 Drew. p. 82; 5 De G. M. & G. 911; 106 R. R. 290; Lindley, 6th ed. p. 568.

CHAPTER XVI.

INJUNCTIONS BETWEEN MORTGAGOR AND MORTGAGEE.

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Mortgagee's right to pursue his remedies concurrently.

As long as anything remains due on the mortgage security a mortgagee may, as a general rule, pursue all his remedies concurrently. He may bring actions of covenant and ejectment, and may at the same time proceed to foreclose the mortgage (*a*). If the mortgagee forecloses first, and the value of the estate proves insufficient to satisfy his debt, he may, while the estate remains in his power to reconvey, sue on the covenant to pay, but he thereby opens the foreclosure and the mortgagor may redeem (*b*). If he sues on the covenant first, and does not get fully paid, he may proceed to foreclose the mortgage. But if he has been fully paid by means of his personal remedy under the covenant, he cannot touch the estate, and is precluded from all proceedings afterwards (*c*). There may, however, be cases of fraud or special contract or other peculiar circumstances, which will deprive a mortgagee of his right to pursue all his remedies concurrently (*d*).

Sale by mortgagee—whether Court will restrain.

The Court has no jurisdiction to restrain a mortgagee from selling under a power of sale, provided he keep within the terms of the power and no case of fraud be made out (*e*).

(*a*) *Schoole* v. *Sall*, 1 Sch. & Lef. 176; *Lockhart* v. *Hardy*, 9 Beav. 349; 15 L. J. Ch. 347; 73 R. R. 379; *Willes* v. *Levett*, 1 De G. & S. 392; *Kinnaird* v. *Trollope*, 39 C. D. 643, 644; 57 L. J. Ch. 905.

(*b*) *Lockhart* v. *Hardy*, *supra*; *Palmer* v. *Hendrie*, 27 Beav. 351; 28 Beav. 341; 122 R. R. 426; *Kinnaird* v. *Trollope*, *supra*; *Worthington* v. *Abbott*, (1910) 1 Ch. p. 595; 79 L. J. Ch. p. 254.

(*c*) *Lockhart* v. *Hardy*, *Kinnaird* v. *Trollope*, *supra*.

(*d*) *Cockell* v. *Bacon*, 16 Beav. 159; 96 R. R. 73.

(*e*) See *Jenkins* v. *Jones*, 2 Giff. 99; 29 L. J. Ch. 493; *Adams* v. *Scott*, 7 W. R. 213; *Warner* v. *Jacob*, 20 C. D. p. 224; 51 L. J. Ch. 642; *Odson* v. *Williams*, 58 L. J. Ch. 539; *Kennedy* v. *De Trafford*, (1896) 1 Ch. 762; 65 L. J. Ch. 465; (1897) A. C. 180; 66 L. J. Ch. 413; *Nutt* v. *Easton*, (1899) 1 Ch. 877; 68 L. J. Ch. 367; affirmed, (1900) 1 Ch. 29; 69 L. J. Ch. 46; *Hodson* v. *Deane*, (1903) 2 Ch. 647, 653; 72 L. J. Ch. 751; and see *Haddington Island Quarry Co.* v.

But the mortgagee will be restrained from selling without satisfying any condition which by the mortgage deed is imposed upon the exercise of the power (*f*).

A mere offer unaccompanied by actual tender of the monies due is not sufficient to prevent a sale (*g*). So long as the mortgagee is acting *bonâ fide*, he can only be restrained by tender of the principal monies due, interest and costs (*h*); or, if an action is pending, by payment into Court of the amount which the mortgagee claims to be due to him (*i*). If, however, it appears upon the face of the mortgage deed that the mortgagee is claiming more than is due to him, the mortgagor will not be required to pay into Court the full amount claimed (*k*).

Bills of Sale Act, 1882, s. 7.

Sect. 7 of the Bills of Sale Act, 1882, which prevents seizure of personal chattels under a bill of sale except for the causes therein mentioned, provides (*inter alia*) that the grantor may, within five days from the seizure or taking possession of any chattels, apply to the High Court, or to a judge thereof in chambers, and such Court or judge, if satisfied that by payment or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just (*l*).

A sale by a mortgagee under a power, even with stringent conditions, will not be restrained on light grounds (*m*).

Huson, (1911) A. C. 722; 105 L. T. 467 (P. C.).

(*f*) See *Gill* v. *Newton*, 14 W. R. 490.

(*g*) *Matthie* v. *Edwards*, 16 L. J. Ch. 405; *Warner* v. *Jacob*, 20 C. D. p. 224; 51 L. J. Ch. 642.

(*h*) *Paynter* v. *Carew*, Kay, App. 36; 23 L. J. Ch. 596; 101 R. R. 852; *Hill* v. *Kirkwood*, 28 W. R. 358; *Warner* v. *Jacob*, 20 C. D. p. 224; 51 L. J. Ch. 642; *Deverges* v. *Sandeman & Co.*, (1902) 1 Ch. p. 597; 71 L. J. Ch. p. 328; *Stubbs* v. *Slater*, (1910) 1 Ch. p. 645; 79 L. J. Ch. p. 427.

(*i*) *Whitworth* v. *Rhodes*, 20 L. J. Ch. 105; *Warner* v. *Jacob*, *supra*; *Hickson* v. *Darlow*, 23 C. D. 690; 48 L. T. 449; *Macleod* v. *Jones*, 24 C. D. 289; 53 L. J. Ch. 145; *Hill* v. *Kirkwood*; *Stubbs* v. *Slater*, *supra*.

(*k*) *Hickson* v. *Darlow*, *supra*.

(*l*) See *Ex parte Cotton*, 11 Q. B. D. 301; 49 L. T. 52; *Hill* v. *Kirkwood*, 28 W. R. 358; *Hickson* v. *Darlow*, *supra*.

(*m*) *Kershaw* v. *Kalow*, 1 Jur. N. S. 974; *Macleod* v. *Jones*, 24 C. D. 296, 299; 53 L. J. Ch. p. 149.

Where a special authority to sell has been given to a person, and it is alleged that it has been revoked at law, an injunction will no be granted to restrain a sale unless the power has been revoked in equity. Thus an injunction to restrain the exercise of a power of sale given to secure a balance to be ascertained by an arbitrator was refused, although the award was made after the plaintiff had executed a deed for the purpose of revoking his authority (*n*).

If special circumstances, however, be made out, a mortgagee will be restrained by injunction from selling under his power of sale. Where, for example, the mortgagee of the property of a company was also a shareholder in the company and had presented a petition for winding-up the company, he was restrained from exercising his power of sale under the mortgage until the hearing of the petition (*o*).

When mortgagee solicitor of mortgagor, sale may be restrained without requiring whole sum claimed by mortgagee to be paid into Court.

The ordinary rule that the Court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into Court the sum sworn by the mortgagee to be due for principal, interest, and costs, does not apply to a case where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the Court will look at all the circumstances of the case, and will make such order as will save the mortgagor from oppression without injuring the security of the mortgagee (*p*).

Power of sale not stopped by instituting redemption or foreclosure action.

The mere institution of a redemption action does not affect the mortgagee's power of sale (*q*); nor will the commencement of a foreclosure action by the mortgagee prevent his exercising the power of sale, but after the order *nisi* for foreclosure, and before the foreclosure is made absolute, the power of sale can only be exercised by leave of the Court (*r*).

(*n*) *Harcourt* v. *Ramsbottom*, 1 J. & W. 505.

(*o*) *Ex parte Fell*, 29 W. R. 881, (1881) W. N. 125.

(*p*) *Macleod* v. *Jones*, 24 C. D. 289; 53 L. J. Ch. 145.

(*q*) *Adams* v. *Scott*, 7 W. R. 213; 113 R. R. 1005; *Stevens* v. *Theatres, Limited*, (1903) 1 Ch. p. 861; 72 L. J. Ch. 764.

(*r*) *Stevens* v. *Theatres, Limited*, (1903) 1 Ch. 857; 72 L. J. Ch. 764; *Halkett* v. *Dudley* (*Earl*), (1907) 1 Ch. p. 603; 76 L. J. Ch. p. 337.

Mortgagee exercising power of sale not trustee for mortgagor.

A mortgagee in exercising his power of sale, is not a trustee in the ordinary sense for the mortgagor (*s*), even where the mortgage is in the form of a trust for sale (*t*); for although a mortgagee is under obligations to the mortgagor, he has rights of his own which he is entitled to exercise adversely to the mortgagor, while a trustee for sale has no right to place himself in such a position as to give rise to a conflict of interest and duty. Accordingly a sale by a mortgagee at an undervalue will not be set aside, unless the price is so inadequate as to be evidence of fraud (*u*). In fact the only obligation upon a mortgagee selling under his power of sale is that he should act in good faith, and take reasonable precautions to obtain a proper price. In determining whether the mortgagee's conduct in this respect comes up to the required standard, regard must be had to the circumstances of the particular case (*x*).

Mortgagee with power of sale is a trustee of surplus.

A mortgagee with a power of sale is, however, in the position of a trustee for the mortgagor and those claiming under him of the surplus monies that may remain after satisfaction of what is owing under the mortgage (*y*); and he may be

(*s*) *Warner* v. *Jacob*, 20 C D. 220; 51 L. J. Ch. 642; *Farrar* v. *Farrars, Limited*, 40 C. D. 410, 411; 58 L. J. Ch. p. 194; *Kennedy* v. *De Trafford*, (1896) 1 Ch. 762, 772; 65 L. J. Ch. 465; (1897) A. C. 180; 66 L. J. Ch. 413; *Nutt* v. *Easton*, (1899) 1 Ch. p. 879; 68 L. J. Ch. 367; (1900) 1 Ch. 29; 69 L. J. Ch. 46; *Hodson* v. *Deans*, (1903) 2 Ch. p. 652; 72 L. J. Ch. p. 753; *Turner* v. *Walsh*, (1909) 2 K. B. p. 496; 78 L. J. K. B. p. 760; *Haddington Island Quarry Co.* v. *Huson*, (1911) A. C. 729; 105 L. T. 467 (P. C.); see as to sales by mortgagees, Conveyancing Act, 1881, s. 21, sub-s. 6, as amended by Conveyancing Act, 1911, s. 5, sub-s. 2.

(*t*) *Warner* v. *Jacob*, 20 C. D. 220; 51 L. J. Ch. 642.

(*u*) *Warner* v. *Jacob*, 20 C. D. p. 224; 51 L. J. Ch. 642; *Field* v. *Debenture Corporation*, (1896) 12 T. L. R. 470; *Farrar* v. *Farrars, Limited*, 40 C. D. p. 411; 58 L. J. Ch. p. 194; and see *Kennedy* v. *De Trafford*, (1897) A. C. 180; 66 L. J. Ch. 413; *Haddington* v. *Island Quarry Co.* v. *Huson*, (1911) A. C. 722, 729; 105 L. T. 467 (P. C.).

(*x*) *Kennedy* v. *De Trafford*, (1897) A. C. 180, 185, 192; 66 L. J. Ch. 413; and see *Nutt* v. *Easton*, (1899) 1 Ch. 873; 68 L. J. Ch. 367; (1900) 1 Ch. 29; 69 L. J. Ch. 46; *Haddington Island Quarry Co.* v. *Huson*, *supra*.

(*y*) *Jenkins* v. *Jones*, 2 Giff. p. 108; *Warner* v. *Jacob*, 20 C. D. 220; 51 L. J. Ch. 642; and see sect. 21, sub-sect. 3, Conveyancing Act, 1881.

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ordered to pay interest on such surplus monies in his hands (*z*).

Where mortgagee also a trustee.

The trustee of a chapel belonging to a public body, being also a mortgagee of the chapel under an instrument executed for the purposes of the trusts, will not be restrained from exercising the rights of a mortgagee, although in opposition to the trusts (*a*).

Injunctions against mortgagor on application of mortgagee.

A legal mortgagee of business premises, such as an hotel, who is prevented by the mortgagor from taking possession under the mortgage may, provided that the mortgage includes the goodwill, obtain on interlocutory application an order for the appointment of a receiver and manager (*b*), and an injunction restraining the mortgagor from interfering with the management of the business and the possession of the premises (*c*).

Where a mortgagee has appointed a receiver under the Conveyancing Act, 1881, the Court will restrain the mortgagor from distraining for rent due from a tenant of the property. This will be done even in a case where the receiver is negligent in collecting the rents (*d*).

Waste by mortgagor in possession.

A mortgagor in possession is in equity the owner of the estate, and may accordingly exercise all acts of ownership, provided he does not thereby render the security insufficient (*e*). But if the security is insufficient, he may not commit waste (*f*), and will be restrained from cutting timber (*g*). A

(*z*) *Charles* v. *Jones*, 35 C. D. 544; 56 L. J. Ch. 745; *Eley* v. *Read*, 76 L. T. 39.

(*a*) *Att.-Gen.* v. *Hardy*, 1 Sim. N. S. 338; 20 L. J. Ch. 450; *Re Mason's Orphanage and London and North Western Railway*, (1896) 1 Ch. p. 59; 65 L. J. Ch. p. 35.

(*b*) *Truman & Co.* v. *Redgrave*, 18 C. D. 547; 50 L. J. Ch. 830; *Whitley* v. *Challis*, (1892) 1 Ch. 64; 61 L. J. Ch. 307; and see *In re Leas Hotel Co.*, (1902) 1 Ch. 332; 71 L. J. Ch. 294; *Leney* v. *Callingham*, (1908) 1 K. B. 79, 84: 77 L. J. K. B. 64, 67; *Re Newdigate Colliery Co.*, (1912) 1 Ch. p. 472; 81 L. J. Ch. p. 238.

(*c*) *Truman & Co.* v. *Redgrave*, 18 C. D. 547.

(*d*) *Bayly* v. *Went*, (1884) W. N. 197; 51 L. T. 765; *Woolston* v. *Ross*, (1900) 1 Ch. 788; 69 L. J. Ch. 363.

(*e*) *Kekewich* v. *Marker*, 3 Mac. & G. p. 329; 21 L. J. Ch. p. 188; 87 R. R. 99.

(*f*) *Humphreys* v. *Harrison*, 1 J. & W. 581; 21 R. R. 238; *Harper* v. *Aplin*, 54 L. T. 383.

(*g*) *Humphreys* v. *Harrison*, *supra*; *Hippesley* v. *Spencer*, 5

mortgagor in possession will also be restrained from committing waste after a decree for foreclosure *nisi* (*h*), and from cutting and removing crops after a demand for possession by the mortgagee (*i*).

Waste by mortgagee in possession.

A mortgagee in possession with a sufficient security will be restrained from committing waste (*k*). In the case of a mortgage made by deed after the 31st of December, 1881, the mortgagee, in the absence of provision to the contrary, may, while in possession, cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament (*l*).

Mortgage of advowson.

Presentation.

When an advowson is the subject of a mortgage, the Court will, upon the tender of the mortgage monies by the mortgagor, restrain the mortgagee from presenting, though a bill for foreclosure has been instituted. The mortgagee does not till after foreclosure acquire a right to present (*m*).

Mortgage of a ship.

A mortgagor of a ship remaining in possession retains under the Merchant Shipping Act, 1894 (*n*), all the rights and powers of ownership, and his contracts with regard to the ship will be valid and effectual, provided his dealings do not materially impair the security of the mortgage (*o*). Accordingly, when a mortgagor in possession had entered into a charter-party, the mortgagees were restrained at the suit of the charterers from dealing with the ship in derogation of the charter-party (*p*). But where mortgagors in possession had entered into a charter-party for the carriage of contra-

Madd. 422; *King* v. *Smith*, 2 Hare, 239; 62 R. R. 93; *Harper* v. *Aplin*, note (*f*), *supra*. As to when a security is "insufficient," see *King* v. *Smith*, *supra*.

(*h*) *Goodman* v. *Kine*, 8 Beav. 379.

(*i*) *Bagnall* v. *Villar*, 12 C. D. 812; 48 L. J. Ch. 695.

(*k*) *Millett* v. *Davey*, 31 Beav. p. 475; 32 L. J. Ch. p. 124.

(*l*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 19, sub-sect. (iv.).

(*m*) *Amhurst* v. *Dawling*, 2 Vern. 401. See *Gardiner* v. *Griffith*, 2 P. Wms. 403.

(*n*) 57 & 58 Vict. c. 60, s. 34.

(*o*) *Collins* v. *Lamport*, 4 De G. J. & S. 500; 34 L. J. Ch. 196; *Keith* v. *Burrows*, 2 A. C. 645, 646; 46 L. J. C. P. p. 807; *The Heather Bell*, (1901) P. 280; 70 L. J. P. 57; *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade*, (1905) 1 K. B. p. 822; 74 L. J. K. B. 577; *The Manor*, (1907) P 339, 358; 77 L. J. P. p. 17.

(*p*) *Collins* v. *Lamport*, *supra*.

band of war, and the ship was not insured against the risk, the mortgagees were held entitled to a declaration that the c' arter-party was not binding upon them (*q*).

Injunctions at suit of equitable mortgagee.

The mortgagee of an equity of redemption may, on a proper case being made out, obtain an injunction to restrain the mortgagee or other person in possession of the legal estate from paying over to the mortgagor the surplus rents or monies which remain after the satisfaction of his own claim (*r*).

Right of legal mortgagee to appointment of receiver.

Under the old law a mortgagee having the legal estate could not, except under special circumstances, obtain a receiver, because he could take possession under his legal title (*s*). But since the Judicature Acts the Court may, in its discretion, appoint a receiver at the instance of a legal mortgagee (*t*). A mortgagee, however, who has once taken possession, cannot relinquish it at his pleasure. Having once assumed the responsibilities attaching to a mortgagee in possession, he cannot, at his own pleasure, get rid of them; and as a general rule the Court will not, by appointing a receiver, assist him to do so (*u*).

Puisne mortgagee.

A receiver will not be appointed at the instance of a puisne mortgagee if a prior legal incumbrancer is in possession, unless the applicant will pay off the prior mortgagee's demand. If the prior incumbrancer be not in possession, a puisne mortgagee may obtain the appointment of a receiver, without prejudice to the right of the prior mortgagee to apply for possession (*v*).

(*q*) *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade*, (1905) 1 K. B. 815; 74 L. J. K. B. 577.

(*r*) *Parker* v. *Calcraft*, 6 Madd. 11.

(*s*) *Berney* v. *Sewell*, 1 J. & W. 647; 21 R. R. 265; *Tillett* v. *Nixen*, 25 C. D. p. 239; 53 L. J. Ch. 199; *Re Pope*, 17 Q. B. D. p. 749; 55 L. J. Q. B. p. 524.

(*t*) *Re Prytherch*, 42 C. D. 590; 59 L. J. Ch. 79; *Re Pope*, *supra*.

(*u*) Ib.; but see *Tillett* v. *Nixen*, 25 C. D. 238; 53 L. J. Ch. 199; *Mason* v. *Westoby*, 32 C. D. 206; 55 L. J. Ch. 507; *County of Gloucester Bank* v. *Rudry, Merthyr, etc., Steam Co.*, (1895) 1 Ch. 629, 640; 64 L. J. Ch. p. 456.

(*v*) *Berney* v. *Sewell*, 1 J. & W. 647; 21 R. R. 265; *Brooks* v. *Greathe* ', 1 J. & W. 176; *Underhay* v. *Re.d*, 20 Q. B. D p. 218; 57 L. J. Q. B. p. 133; *Re London Pressed Hinge Co.*, (1905) 1 Ch. p. 582; 74 L. J. Ch. p. 325. See *Re Metropolitan Amalgamated Estates Co.*, (1912) 2 Ch. 501, 502; 81 L. J. Ch. 745.

Equitable mortgagee by deposit of deeds.

An equitable mortgagee by deposit of deeds may obtain an injunction, or the appointment of a receiver, for the protection of his security (*x*). So also may a person who is possessed of an equitable lien (*y*). The lien which a solicitor has on the papers of his client will be protected by injunction (*z*).

Solicitor's lien.

The appointment of a receiver at the instance of an equitable incumbrancer, where nothing is presently payable to him, is a matter in the discretion of the Court (*a*).

Injunction to restrain parting with the legal estate.

In an action by an equitable mortgagee for sale and foreclosure, an interim injunction was granted to restrain dealing with the legal estate till the next motion day on an *ex parte* application by the plaintiff, there being ground to believe that the defendant intended to part with the legal estate (*b*).

Debenture-holders.

Upon the principle that a mortgagee is entitled to the protection of his security, the Court will, at the instance of a debenture-holder of a limited company, where the debenture creates a floating charge on the property of the company, appoint a receiver of the property so charged, if the security is in jeopardy, even though the principal money is not yet due, and default has not yet been made in payment of interest (*c*).

Mortgagor in possession entitled to sue for injury to property without joining mortgagee.

A mortgagor in receipt of the rents and profits has a sufficient interest to enable him to maintain an action for an

(*x*) *Meux* v. *Bell*, 7 Jur. 821; *Bodger* v. *Bodger*, 11 W. R. 160.

(*y*) *Holroyd* v. *Marshall*, 10 H. L. C. 191; 33 L. J. Ch. 193, 197; *Middleton* v. *Magnay*, 2 H. & M. 233; *Gurnell* v. *Gardner*, 4 Giff. 686.

(*z*) *Stedman* v. *Webb*, 4 M. & C. 346; 8 L. J. Ch. 196; *Richards* v. *Platel*, Cr. & Ph. 79, 80; 10 L. J. Ch. 375; 54 R. R. 216; *Watson* v. *Lyon*, 7 De G. M. & G. 288; 24 L. J. Ch. 754; 109 R. R. 122.

(*a*) *In re London Pressed Hinge Co.*, (1905) 1 Ch. p. 582; 74 L. J. Ch. p. 325.

(*b*) *London and County Banking Co.* v. *Lewis*, 21 C. D. 490.

(*c*) *McMahon* v. *North Kent Ironworks Co.*, (1891) 2 Ch. 148; 60 L. J. Ch. 372; *Thorn* v. *Nine Reefs Co.*, (1892) 67 L. T. 93; *Edwards* v. *Standard Rolling Stock Syndicate*, (1893) 1 Ch. 574; 62 L. J. Ch. 605; *In re Victoria Steamboats Co.*, (1897) 1 Ch. 158; 66 L. J. Ch. 21; *In re London Pressed Hinge Co.*, (1905) 1 Ch. 576; 74 L. J. Ch. 321; *In re Carshalton Park Estate*, (1908) 2 Ch. 62; 77 L. J. Ch. 550. As to jeopardy, see *In re New York Taxicab Co.*, (1913) 1 Ch. 1; 82 L. J. Ch. 41; *In re Tilt Cove Copper Co.*, (1913) 2 Ch. 588; 82 L. J. Ch. 545.

injunction to restrain an injury done to the mortgaged premises without joining the mortgagee (*d*).

Mortgagee after entry can sue for injury to property committed before entry.

A mortgagee after entry into possession is entitled to maintain an action against a wrongdoer for a trespass committed prior to his entry (*e*).

Tenant for life restrained from mortgaging to prejudice of other incumbrancers.

When a tenant for life proposed to mortgage settled lands under sect. 11 of the Settled Land Act, 1890, under such circumstances that the interests of certain annuitants would have been unjustly prejudiced thereby, the Court restrained him from carrying out the mortgage otherwise than subject to the rights of such annuitants (*f*).

(*d*) *Fairclough* v. *Marshall*, 4 Ex. D. 37; 39 L. T. 389; *Van Gelder & Co.* v. *Sowerby Bridge Flour Society*, 44 C. D. 374, 390; 59 L. J. Ch. 587, 588. See the Judicature Act, 1873, sect. 25, subsect. 5; and *Turner* v. *Walsh*, (1909) 2 K. B. 484, 495; 78 L. J. K. B. p. 759.

(*e*) *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, (1905) 2 K. B. 493; 74 L. J. K. B. 799.

(*f*) *Hampden* v. *Buckinghamshire (Earl)*, (1893) 2 Ch. 531, 544; 62 L. J. Ch. 643. See *Re Richardson*, (1900) 2 Ch. 778, 790; 69 L. J. Ch. p. 811.

CHAPTER XVII.

INJUNCTIONS AGAINST COMPANIES.

The Court will, on a proper case being made out, restrain companies, whether incorporated by Statute or constituted under deeds of settlement, from doing illegal acts.

The principles on which the Court interferes in restraining a company from doing illegal acts are the same as those on which it interferes in other cases. If the right at law is clear, and the breach is clear, and serious injury is likely to arise from the breach, the Court will interfere at once and protect the right by injunction. But if the right at law is not clear or the breach is doubtful, the Court, in determining whether or not it shall interfere by injunction, is guided by the balance of convenience and inconvenience likely to arise to the parties from granting or withholding the injunction (*a*).

Powers of Companies.

Companies incorporated by Statute are bound to confine themselves within the limits of the powers which have been conferred upon them by the legislature, and to proceed in the mode which the legislature has pointed out. If a company goes beyond the line of its authority, and violates the rights of others, it becomes amenable to the jurisdiction of the Court by injunction (*b*).

Companies incorporated for a special purpose exist for

(*a*) *Fielden* v. *Lancashire and Yorkshire Railway Co.*, 2 De G. & Sm. 531; *Norman* v. *Mitchell*, 5 De G. M. & G. p. 673; 104 R. R. 244.

(*b*) *Ashbury Railway Co.* v. *Riche*, L. R. 7 H. L. 693; 44 L. J. Ex. 185; *Wenlock* (*Baroness*) v. *River Dee Co.* (1885), 10 A. C. 354; 54 L. J. Q. B. 577; Ib. 36 C. D. 675 n., 685 n.; 56 L. J. Ch. 899. See *Att.-Gen.* v. *Mersey Railway Co.*, (1906) 1 Ch. 811; 75 L. J. Ch. 385; affirmed (1907) A. C. 415; 76 L. J. Ch. 568; *Att.-Gen.* v. *Manchester Corporation*, (1906) 1 Ch. p. 651; 75 L. J. Ch. 330 (where the distinction between a statutory corporation and one incorporated by Royal Charter is pointed out); *Marriott* v. *East Grinstead Gas and Water Co.*, (1909) 1 Ch. 70, 78; 78 L. J. Ch. 141; *Att.-Gen.* v. *West Gloucestershire Water Co.*, (1909) 2 Ch. 340, 341; 78 L. J. Ch. 746.

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those purposes only for which they have been incorporated, and for no other purpose whatever (*c*). The agency of the company, the course of action, and the sphere of action of the company, are limited entirely to that which is defined by the legislature (*d*). Those things which are incident to and may reasonably and properly be done under the main purpose, though they may not literally be within it, are not prohibited (*e*). The Court will restrain a company, which has been formed for a special purpose, from going beyond or exceeding the scope of such purpose. Thus, a railway company was restrained from carrying on the business of coal merchants (*f*), or of omnibus proprietors (*g*), or the business of a shipping company or of brewers (*h*), or from purchasing shares in another company (*i*). A company formed to make and deal in railway carriages cannot purchase a concession for making a foreign railway (*k*); and on the same principle a company formed solely for the purpose of carrying on the business of life insurance was restrained from carrying on the business of marine insurance (*l*); and a company formed for the purpose of carrying on insurance and guarantee business in all branches (except "the business of life insurance")

Ultra vires acts.

(*c*) *Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 287; 21 L. J. Q. B. 297; 88 R. R. 587; *National Manure Co.* v. *Donald*, 4 H. & N. 8; 28 L. J. Ex. 185; 118 R. R. 299. See *Kingsbury Collieries Co. and Moore's Contract*, (1907) 2 Ch. p. 264; 76 L. J. Ch. p. 471.

(*d*) *Wenlock* (*Baroness*) v. *River Dee Co.*, 10 A. C. p. 362; 54 L. J. Q. B. 577; *London County Council* v. *Att.-Gen.*, (1902) A. C. 165; 71 L. J. Ch. 268; *Att.-Gen.* v. *North Eastern Railway Co.*, (1906) 2 Ch. p. 686; 76 L. J. Ch. 5; *Att.-Gen.* v. *West Gloucestershire Waterworks Co.*, (1909) 2 Ch. p. 340; 78 L. J. Ch. 746.

(*e*) *Att.-Gen.* v. *Great Eastern Railway Co.*, 5 A. C. p. 481; 49 L. J. Ch. 545; *London and North Western Railway Co.* v. *Price*, 11 Q. B. D. 485, 489; 52 L. J. Q. B. 754; *Stagg* v. *Medway* (*Upper*) *Navigation Co.*, (1903) 1 Ch. 169; 72 L. J. Ch. 177; *Att.-Gen.* v. *West Gloucestershire Waterworks Co.*, (1909) 2 Ch. 343, 345; 78 L. J. Ch. 746.

(*f*) *Att.-Gen.* v. *Great Northern Railway Co.*, 1 Dr. & Sm. 154.

(*g*) *Att.-Gen.* v. *Mersey Railway Co.*, (1906) 1 Ch. 811; (1907) A. C. 415; 76 L. J. Ch. 568.

(*h*) *Lyde* v. *Eastern Benga' Railway Co.*, 36 Beav. 10.

(*i*) *Great Western Railway Co.* v. *Metropolitan Railway Co.*, 32 L. J. Ch. 382.

(*k*) *Ashbury Carriage Co.* v. *Riche*, L. R. 7 H. L. 653; 44 L. J. Ex. 185.

(*l*) *Phœnix Life Assurance Co.*, 2 J. & H. 441.

was restrained from issuing investment policies with a provision for the return of the whole or part of the premiums on the assured's death within the period, as being life assurance business within the meaning of sect. 1 sub-sect. (a) of the Assurance Companies Act, 1909 (*m*). "It is," said Lord Hatherley, "a principle of public policy that where Parliament has authorised a corporation to raise a large capital for a specific purpose, the privilege confers no right upon the company to employ its capital in competition with the general public upon speculations of a different kind" (*n*). So also a water company was restrained from supplying water outside its statutory limits (*o*), or from constructing works not authorised by its special Act (*p*). On the same principle, the London County Council was restrained from carrying on the business of omnibus proprietors in connection with its tramway undertaking (*q*), and a municipal corporation was restrained from carrying on the business of common carriers apart from its authorised tramway business (*r*), and a municipal corporation empowered to supply electricity was restrained from supplying electrical fittings and apparatus for the use of consumers (*s*), and a society registered under the Friendly Societies Act, 1896, was restrained from converting itself into a company under the Companies (Consolidation) Act, 1908, with objects more extensive than and differing from the objects specified in the rules of the society (*t*).

(*m*) *Joseph* v. *Law Integrity Insurance Co.*, (1912) 2 Ch. 581; 82 L. J. Ch. 187.

(*n*) *Hare* v. *London and North Western Railway Co.* 2 J. & H. 109; 30 L. J. Ch. 817; and see *Att.-Gen.* v. *Great Northern Railway Co.*, 1 Dr. & Sm. 154.

(*o*) *Att.-Gen.* v. *West Gloucestershire Waterworks Co.*, (1909) 2 Ch. 338; 78 L. J. Ch. 746.

(*p*) *Att.-Gen.* v. *Frimley and Farnborough District Water Co.*, (1908) 1 Ch. 727; 77 L. J. Ch. 442; *Att.-Gen.* v. *South Staffordshire Waterworks Co.*, (1909) 25 T. L. R. 498; *Marriott* v. *East Grinstead Gas and Water Co.*, (1909) 1 Ch. p. 77; 78 L. J. Ch. p. 143. Cf. *Att.-Gen.* v. *Barnet Gas and Water Co.*, (1909) 101 L. T. 651; (1910) 102 L. T. 546.

(*q*) *London County Council* v. *Att.-Gen.*, (1902) A. C. 165; 71 L. J. Ch. 268.

(*r*) *Att.-Gen.* v. *Manchester Corporation*, (1906) 1 Ch. 643; 75 L. J. Ch. 330.

(*s*) *Att.-Gen.* v. *Leicester Corporation*, (1910) 2 Ch. 359; 80 L. J. Ch. 21.

(*t*) *Blythe* v. *Birtley*, (1910) 1 Ch.

Proceedings to restrain *ultra vires* acts by public body should be by Attorney-General.

Proceedings to restrain a railway company or other public body from exceeding its powers should be instituted by the Attorney-General. A rival company is not qualified to represent the rights and interests of the public (*u*). To support an information, no substantial damage or definite injury to the public need be shown. It is enough that the company has not strictly followed, or is about to transgress, the powers which have been vested in it by the legislature (*x*), or is doing an act which is illegal and tends to the injury of the public (*y*).

The Attorney-General's discretion as to suing.

The Court has no jurisdiction to interfere with the discretion of the Attorney-General in consenting or refusing to put the law in motion in matters affecting the public. If there is an excess of power claimed by a particular body, it is for the Attorney-General, and not for the Courts, to determine whether he should institute proceedings or not (*z*). On the other hand the Attorney-General is not entitled to an injunction as a matter of right, on proving his case, for the Court has a discretion as to granting an injunction and may in a proper case refuse such relief, *e.g.*, where it involves the removal of works which have been erected without opposition, and maintained at considerable expense for a long period of time (*a*), or where there has been great delay in

The Court has discretion as to granting an injunction.

228; 79 L. J. Ch. 315; cf. *McHlade* v. *Royal London Mutual Insurance Co*, (1910) 2 Ch. 169; 79 L. J. Ch. 631.

(*u*) *Stockport Waterworks Co.* v. *Mayor, &c., of Manchester*, 9 Jur. N. S. 266; *Pudsey Gas Co.* v. *Bradford*, 15 Eq. 167. See *Att.-Gen.* v. *London and North Western Railway Co.*, (1900) 1 Q. B. 78; 69 L. J. Q. B. 26; *London County Council* v. *Att.-Gen.*, (1902) A. C. 165, 168; 71 L. J. Ch. 268; *Att.-Gen.* v. *Pontypridd Waterworks Co.*, (1908) 1 Ch. 388; 77 L. J. Ch. 237.

(*x*) *Liverpool Corporation* v. *Chorley Waterworks Co.*, 2 De G. M. & G. 860; *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 228; 28 L. J. Ch. 153; *Att.-Gen.* v. *Cockermouth Local Board*, 18 Eq. 172; 44 L. J. Ch. 118; *Bonner* v. *Great Western Railway Co.*, 24 C. D. p. 8; *Jordeson* v. *Sutton*, (1899) 2 Ch. 217; 68 L. J. Ch. 457; *Att.-Gen.* v. *London and North Western Railway Co.*, (1900) 1 Q. B. 78; 69 L. J. Q. B. 26; *Marriott* v. *East Grinstead Gas and Water Co.*, (1909) 1 Ch. p. 79; 78 L. J. Ch. p. 144.

(*y*) *Att.-Gen.* v. *Shrewsbury Bridge Co.*, 21 C. D. 752.

(*z*) *London County Council* v. *Att.-Gen.*, (1902) A. C. p. 168; 71 L. J. Ch. 268.

(*a*) *Att.-Gen.* v. *Grand Junction Canal Co.*, (1909) 2 Ch. 505, 518; 78 L. J. Ch. 681.

instituting the proceedings, or where the wrongful act is being made good by the defendants and the Court is satisfied that they have no intention of repeating it (*b*).

When private person can sue.

Although, as stated above, proceedings to restrain a public body from exceeding its powers should be instituted by the Attorney-General, a private individual may sue, if he can show special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the King's subjects by the infringement of the law (*c*). But when the act prohibited is obviously prohibited for the protection of a particular person, then it is not necessary to allege special damage (*d*).

In a case in which a railway company had constantly allowed its trains to pass over a level crossing at a speed exceeding four miles an hour, in disregard of the provisions of sect. 48 of the Railways Clauses Act, 1845, an information was filed by the Attorney-General to restrain it from so doing. The railway company set up as a defence that there was no proof of any injury occasioned to the public, and that the inconvenience to the public by reason of the existence of the level crossing would be increased if it complied with the requirements of sect. 48 of the Railways Clauses Act; but it was held that as the information was filed by the Attorney-General to enforce the express terms of an enactment made by the legislature in the interests of the public, the Court could not entertain the question whether injury to the public was in fact occasioned by the contravention of the Act, but was bound to grant the injunction (*e*).

(*b*) See *Att.-Gen.* v. *Wimbledon House Estate Co.*, (1904) 2 Ch. p. 42; 73 L. J. Ch. p. 596; *Att.-Gen.* v. *Birmingham, Tame, &c., Drainage Board*, (1910) 1 Ch. p. 53; 79 L. J. Ch. p. 139; (1912) A. C. p. 812, (1913) 82 L. J. Ch. p. 56.

(*c*) *Liverpool Corporation* v. *Chorley Waterworks Co.*, 2 De G. M. & G. 852, 860; *Pudsey Gas Co.* v. *Bradford Corporation*, 15 Eq. 167; *Aerators, Ld.* v. *Tollett*, (1902) 2 Ch. p. 325; 71 L. J. Ch. p. 729; *Boyce* v. *Paddington Borough Council*, (1903) 1 Ch. p. 114; 72 L. J. Ch. p. 32; *Marriott* v. *East Grinstead Gas and Water Co.*, (1909) 1 Ch. p. 78; 78 L. J. Ch. p. 143.

(*d*) *Chamberlaine* v. *Chester and Birkenhead Railway Co.*, 1 Exch. 870; 18 L. J. Ex. 494.

(*e*) *Att.-Gen.* v. *London and North Western Railway Co.*, (1906) 1 Q. B. 78; 69 L. J. Q. B. 26.

Where a railway company, authorised by special Act to construct a main line with a branch, completed the one but took no steps to construct the other, the Court refused to compel specific performance of the Act by granting an injunction (*f*).

Opening of railway.

A railway company has been restrained from opening its line without the sanction of the Board of Trade (*g*): and where an inspector of the Board of Trade reports, in accordance with 5 & 6 Vict. c. 55, s. 6, that the opening of a railway, or branch of a railway, will be attended with danger to the public by reason of the incompleteness of the works, the Board of Trade has exclusive jurisdiction in the matter, and the Court will not enter into the question as to whether the inspector has come to a wrong conclusion (*h*).

Railway rates.

The Court of Chancery would not restrain a railway company from making certain charges (*i*), or from charging the plaintiff for the carriage of his goods otherwise than equally with other persons (*k*). But by the Railway Traffic and Canal Act, 1854, 17 & 18 Vict. c. 31, ss. 2, 3, power was given to the Court of Common Pleas to grant an injunction against railway and canal companies who, by their traffic arrangements, give an undue or unreasonable preference to, or advantage to, or in favour of any particular person or company in any particular description of traffic, in any respect whatever (*l*). This jurisdiction was transferred to the Railway Commissioners by the Regulation of Railways Act, 1873 (*m*); and has since become vested in the Railway and

(*f*) *Att.-Gen.* v. *Birmingham and Oxford Railway Co.*, 4 De G. & Sm. 490; 3 Mac. & G. 453.

(*g*) *Att.-Gen.* v. *Great Western Railway Co.*, 7 Ch. 767. See, as to sanction of Board of Trade, *Pearce* v. *Wycombe Railway Co.*, 1 Drew. 244; 94 R. R. 655; *Att.-Gen.* v. *Great Northern Railway Co.*, 1 Dr. & Sm. 154.

(*h*) *Att.-Gen.* v. *Great Western Railway Co.*, 4 C. D. 735; 46 L. J. Ch. 192.

(*i*) *Pickford* v. *Grand Junction Railway Co.*, 3 Ra. Ca. 538, 558.

(*k*) *Sutton* v. *South Eastern Railway Co.*, L. R. 1 Ex. 32; 35 L. J. Ex. 38.

(*l*) See *Palmer* v. *London and Brighton and South Coast Railway Co.*, L. R. 6 C. P. 194; 40 L. J. C. P. 133. By 51 & 52 Vict. c. 25, sect. 28, the provisions of sect. 2 of the Act of 1854 are applied to undue preference of goods carried by sea; as to damages in case of undue preference, see *Chance* v. *Great Western Railway Co.*, (1913) 29 T. L. R. 483.

(*m*) 36 & 37 Vict. c. 48, s. 6.

Canal Commissioners by 51 & 52 Vict. c. 25, s. 8. Accordingly if a railway company carries goods for a customer at a lower rate than that charged to other customers, it may be an undue preference and give the other customers a right to complain before the Railway Commissioners, but it is not an act *ultra vires*, and gives no right to a shareholder to sue for an injunction to restrain further preferences (*n*).

Judgment by consent on contract *ultra vires* set aside.

In a case in which a contract which was *ultra vires* had been entered into by a railway company with A, and A afterwards obtained judgment by consent enforcing the contract, it was held, in subsequent proceedings, that the contract was invalid, and that the judgment having been obtained by consent without the question of *ultra vires* being raised, was of no greater validity, and relief was accordingly granted upon that footing (*o*).

Specific performance of contract in derogation of statutory obligation to landowner refused.

So also, where a private Act of a railway company bound the company to maintain a station for a landowner, and the company's successors in title, in ignorance of the provision of the Act, contracted with the plaintiff to pull down the station and erect another nearer to the plaintiff's land, it was held that the contract was *ultra vires* and could not be enforced by the plaintiff, and that it made no difference that the statutory provision was not in the interest of the general public, but for the benefit of a private owner (*p*).

Creditor not entitled to injunction restraining company dealing with its assets.

A creditor cannot, upon the ground that a company is diminishing its fund for the payment of debts, maintain an action to restrain the company from dealing with its assets (otherwise than assets, if any, comprised in the creditor's security) in such manner as the company thinks fit (*q*).

User of land acquired by corporation under statutory powers.

A corporation having acquired land under its statutory powers for the purposes of its undertaking has generally a right to use the land which it has acquired as it th[illegible]

(*n*) *Anderson* v. *Midland Railway Co.*, (1902) 1 Ch. 369; 71 L. J. Ch. 89. See *Fernwood* v. *Great Northern Railway Co.*, (1904) 20 T. L. R. 320.

(*o*) *Great North-West Central Railway Co.* v. *Charlebois*, (1899) A. C. 114; 68 L. J. P. C. 25. See *Connolly* v. *Consumers' Cordage Co.* (1903), 89 L. T. 347.

(*p*) *Corbett* v. *South Eastern and Chatham Railway Co.*, (1906) 2 Ch. 12, 21; 75 L. J. Ch. 489.

(*q*) *Mills* v. *Northern Railway of Buenos Ayres*, 5 Ch. 621, 628.

fit, provided it is not used in a manner which is inconsistent with the proper purposes of the Act under which the company is incorporated (*r*). If the company has been empowered to take land on the banks of a river, it has all the ordinary rights of a riparian proprietor (*s*). So also it has a right to take measures to prevent prescriptive rights being acquired for windows looking over its land (*t*).

But a company incorporated by Act of Parliament and acquiring land under statutory powers for the purposes of its undertaking has not in all respects the same rights over the land as an ordinary purchaser of the land in fee. The company is entitled to use the land for all the purposes of the undertaking whatever they may be, but beyond that it has not the rights of an ordinary purchaser in fee simple. The company can neither use the land nor give any one else the right to use it for any purposes inconsistent with the necessary purposes of the undertaking (*u*), nor can the company delegate or preclude itself from the exercise of its statutory powers (*x*).

(*r*) *Mulliner* v. *Midland Railway Co.*, 11 C. D. 611; 48 L. J. Ch. 258; *Bonner* v. *Great Western Railway Co.*, 24 C. D. 10; *Foster* v. *London, Chatham and Dover Railway Co.*, (1895) 1 Q. B. 711, 720; 64 L. J. Q. B. 65; *In re Gomty and the Manchester, Sheffield and Lincolnshire Railway Co.*, (1896) 2 Q. B. p. 445; 65 L. J. Q. B. 625; *Great Western Railway Co.* v. *Solihull*, 86 L. T. 852; *Great Central Railway Co.* v. *Balby-with-Hexthorpe Urban Council*, (1912) 2 Ch. 110; 81 L. J. Ch. 596.

(*s*) *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, L. R. 7 H. L. 697; 45 L. J. Ch. 638; and see *McCartney* v. *Londonderry and Lough Swilly Railway*, (1904) A. C. 308, 315; 73 L. J. P. C. p. 80.

(*t*) *Bonner* v. *Great Western Railway Co.*, 24 C. D. 10; *Foster* v. *London, Chatham and Dover Railway Co.*, (1895) 1 Q. B. 720; 64 L. J. Q. B. 65.

(*u*) *Mulliner* v. *Midland Railway Co.*, 11 C. D. p. 622; 48 L. J. Ch. 258; *Ayr Harbour Trustees* v. *Oswald*, 8 A. C. p. 634; *Bird* v. *Eggleton*, 29 C. D. p. 1017; 54 L. J. Ch. p. 822; and see *Foster* v. *London, Chatham and Dover Railway Co.*, (1895) 1 Q. B. 711; 64 L. J. Q. B. 65; *Gomty* v. *Manchester, Sheffield and Lincolnshire Railway Co.*, (1896) 2 Q. B. 439; 65 L. J. Q. B. 625; *Taff Vale Railway Co.* v. *Pontypridd Urban Council*, (1905) 93 L. T. 126; *Re South Eastern Railway Co. and Wiffin's Contract*, (1907) 2 Ch. 366; 76 L. J. Ch. 481; *Stourcliffe's Estate Co.* v. *Bournemouth Corporation*, (1910) 2 Ch. p. 22; 79 L. J. Ch. p. 464.

(*x*) *South Eastern Railway Co. and Wiffin's Contract*, (1907) 2 Ch. 366; 76 L. J. Ch. 481; *Eccles Corporation* v. *South Lancashire Tram-*

Where a railway company acquired under its compulsory powers a strip of land on which it constructed a railway, carried over a series of arches, and afterwards let the interiors of the arches for shops to divers persons upon short tenancies, reserving power to resume possession when it deemed it necessary for the purposes of the railway, it was held that such a letting of the arches was not inconsistent with the purposes for which the company was constituted, and was therefore within the company's powers (*y*).

Power of railway company to grant easements.

So also, although a railway company cannot alienate any land which is required for the purposes of its undertaking (*z*), or grant any easement (*a*), or enter into any covenant restricting the user of its land (*b*), which is inconsistent with such purposes, it can grant a right of way or other easement over (*c*), or under (*d*), its lands where it is not inconsistent with the purposes for which the lands were taken. Accordingly, where land was acquired and used by a canal company under its statutes for the purposes of a towing path, and it

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ways Co., (1910) 2 Ch. 263; 79 L. J. Ch. 759; affirmed (1912) A. C. 465; 81 L. J. Ch. 561; *Ticehurst Water and Gas Co.* v. *Gas and Waterworks Supply Co.*, (1911) 55 S. J. 459; see *In re Woking Urban Council (Basingstoke Canal) Act*, 1911, (1913) W. N. 346.

(*y*) *Foster* v. *London, Chatham and Dover Railway Co.*, (1895) 1 Q. B. 711; 64 L. J. Q. B. 625.

(*z*) *Hoods* v. *Midland Railway Co.*, 20 C. D. 418; 51 L. J. Ch. 320; *Dunhill* v. *North Eastern Railwoy Co.*, (1896) 1 Ch. 128, 129; 65 L. J. Ch. 178; *Taff Vale Roilway Co.* v. *Pontypridd Urban Council* (1905), 93 L. T. 126.

(*a*) *Mulliner* v. *Midland Railway Co.*, 11 C. D. 622; 48 L. J. Ch. 258; *Taff Vale Railway Co.* v. *Pontypridd Urban Council* (1905), 93 L. T. 126; *Att.-Gen.* v. *London and South Western Railway Co.* (1905), 21 T. L. R. 220; *Lancashire and Yorkshire Railway Co.* v. *Dovenport* (1906), 4 L. G. R. 425; 70 J. P. 129; *Arnold* v. *Morgan*, (1911) 2 K. B. 314, 323; 80 L. J. K. B. 955; *Great Central Railway Co.* v. *Balby-with-Hexthorpe Urban Council*, (1912) 2 Ch. 110; 81 L. J. Ch. 596.

(*b*) *In re South Eastern Railway Co. and Wiffin's Contract*, (1907) 2 Ch. 366; 76 L. J. Ch. 481.

(*c*) *Gonty* v. *Manchester, Sheffield and Lincolnshire Railway Co.*, (1896) 2 Q. B. 439; 65 L. J. Q. B. 625; *Grand Junction Canal Co.* v. *Petty*, 21 Q. B. D. 273; 57 L. J. Q. B. 572; *Att.-Gen.* v. *London and South Western Railway Co.* (1905), 21 T. L. R. 220; *Lancashire and Yorkshire Railway Co.* v. *Davenport* (1906), 4 L. G. R. 425; 70 J. P. 129; *Arnold* v. *Moryan*, (1911) 2 K. B. 323, 324; 80 L. J. K. B. 955.

(*d*) See *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers*, (1910) 1 Ch., p. 25; 79 L. J. Ch. 150.

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appeared that the use of the land as a public footpath was not inconsistent with its use as a towing path by the company, it was held that the company could dedicate the land as a public footpath, subject to its use by the company as a towing path (*e*). But a canal company cannot grant the right to take water from its canal in derogation of its statutory duties (*f*), nor can the right be acquired against the company by prescription (*g*), nor can a railway company agree to lay down pipes and mains and supply drinking water and thereby possibly deprive itself of water which may be required for working its undertaking (*h*).

Temporary use of land acquired for undertaking.

A railway company may use the land, which it has acquired under the Lands Clauses Act, in the same state and condition, without making any alteration by building or otherwise which would interfere with the rights of its neighbours, until the time arrives when it must either sell the land or satisfy the Court that the land is being kept for the purposes of its undertaking. Until the time arrives when the company must apply the land to the purposes of the undertaking, the company has a perfect right to use the land in the same state in which it was when acquired, but not to alienate it or to do an act which will prevent it from being used for the purposes of the railway. The fact of a stable having been purchased by a railway company for the purposes of its undertaking does not preclude the company from claiming a right of way to it so long as the premises are used as a stable, till such time as the premises are required for the special purposes of the railway or are sold as superfluous land (*i*).

Sale of superfluous lands by railway company.

A railway company selling its superfluous lands may sell

(*e*) *Grand Junction Canal Co.* v. *Petty*, note (*c*), *supra*.

(*f*) *Rochdale Canal Co.* v. *King*, 14 Q. B. 122; 18 L. J. Q. B. 293; 80 R. R. 222, 233; *Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 287; 21 L. J. Q. B. 297; 88 R. R. 211; *Staffordshire and Worcestershire Canal Co.* v. *Birmingham Canal Co.*, L. R. 1 H. L. 254; 35 L. J. Ch. 757; *Manchester Ship Canal Co.* v. *Rochdale Canal Co.* (1899), 81 L. T. 472; and see *Att.-Gen.* v. *Great Northern Railway Co.*, (1909) 1 Ch. 775, 778; 78 L. J. Ch. 377.

(*g*) *Att.-Gen.* v. *Great Northern Railway Co.*, *supra*.

(*h*) *Wilson* v. *Great Western Railway Co.* (1910), 128 L. T. Journal, 340.

(*i*) *Cayley* v. *Great Western Railway Co.*, 26 C. D. 434; 51 L. T. 337.

them in the way that is most advantageous to itself and under such conditions and restrictions as to the mode of user as may be most to the company's advantage as vendor. In that respect the company has the same rights as an ordinary vendor (*k*).

Shareholder may sue to restrain illegal acts causing special injury to himself.

The acts of a company may be illegal as against an individual member of the company, and where such is the case, a shareholder of the company may sue the company to restrain special injury to himself (*l*). The Court will, upon a proper case being made out, interfere by injunction in aid of the legal right. Injunctions have accordingly been granted to restrain the insertion and continuance of a man's name on the register of shareholders (*m*); the interference by the company with a shareholder or debenture-holder in the exercise of his statutory right to inspect at all reasonable times the register of mortgages of the company (*n*), or the interference by the company with a shareholder's right to inspect the register of members of the company (*o*). So, also, an injunction has been granted upon the application of a director restraining the plaintiff's co-directors from wrongfully excluding him

Register.

Exclusion director.

(*k*) *In re Higgins and Hitchman*, 21 C. D. p. 98; 51 L. J. Ch. 772.

(*l*) See *Pulbrook* v. *Richmond Mining Co.*, 9 C. D. 610; 48 L. J. Ch. 65; *Munster* v. *Cammell Co.*, 21 C. D. 183; 51 L. J. Ch. 731.

(*m*) *Taylor* v. *Hughes*, 2 J. & L. 24; 69 R. R. 219; *Bargate* v. *Shortridge*, 5 H. L. C. 297; 24 L. J. Ch. 457; 101 R. R. 163. The procedure in the case of companies governed by the Companies Acts is usually by motion to rectify the register under sect. 32 of the Companies (Consolidation) Act, 1908. See *Duffin* v. *Mexican Gold, etc. Co.*, (1890) W. N. 116. If the case is complicated or doubtful relief should be sought by an action. See *Ex parte Shaw*, 2 Q. B. D. 463.

(*n*) See sect. 45 of the Companies Clauses Act, 1845; sect. 28 of the Companies Clauses Act, 1863; sects. 100—102 of the Companies (Consolidation) Act, 1908; and see *Holland* v. *Dickson*, 37 C. D. 669; 57 L. J. Ch. 502; *Mutter* v. *Eastern and Midland Railway Co.*, 38 C. D. 92; 57 L. J. Ch. 615.

(*o*) See sect. 10 of the Companies Clauses Act, 1845, and *Davies* v. *Gas Light and Coke Co.*, (1909) 1 Ch. 708; 78 L. J. Ch. 445; see also sect. 30, Companies Act, 1908; *Re Balaghat Gold Mining Co.*, (1901) 2 K. B. 665; 70 L. J. K. B. 866. The right of inspection ceases upon the company going into liquidation (*In re Kent Coalfields Syndicate*, (1898) 1 Q. B. 754; 67 L. J. Q. B. 500). See sect. 221, Companies Act, 1908, as to inspection of a company's books during winding-up.

from acting as director (*p*). But in a case in which an interim injunction had been granted restraining directors from excluding the plaintiff from acting as managing director of the company, and subsequently a resolution was passed by the shareholders at a general meeting, that they did not desire the plaintiff to act, the Court dissolved the injunction (*q*). So also an injunction has been granted to restrain the illegal or oppressive forfeiture of shares (*r*). When a shareholder is suing for rescission of the contract to take the shares, the Court will grant an interim injunction restraining a forfeiture on payment into Court of the amount of the call and interest (*s*).

Forfeiture of shares.

Any single registered shareholder has a right to bring an action either in his own name (*t*), or on behalf of himself and all other shareholders who have a common interest with himself, to restrain the application of the common funds of the company to another purpose than the proper purposes of the concern, and the Court will interpose on his behalf by injunction (*u*). The amount of interest of the complaining share-

Who can sue to restrain improper application of company's funds.

(*p*) *Pulbrook* v. *Richmond Mining Co.*, 9 C. D. 610; 48 L. J. Ch. 65; *Munster* v. *Cammell Co.*, 21 C. D. 183; 51 L. J. Ch. 731; *Kysche* v. *Alturas Co.*, 4 T. L. R. 331; 36 W. R. 496; *Turnbull* v. *West Riding Athletic Club*, 70 L. T. 92; *Grundy* v. *Briggs*, (1910) 1 Ch. 446, 452; 79 L. J. Ch. 244.

(*q*) *Bainbridge* v. *Smith*, 41 C. D. 462; 60 L. T. 879; see also *Harben* v. *Phillips*, 23 C. D. 14; 48 L T. 334; and *Cuff* v. *London and County Land Co.*, (1912) 1 Ch. 440, 450; 81 L. J. Ch. 426; in which case the Court refused to grant a mandatory injunction at the instance of auditors, who claimed access to the books of the company, before the shareholders had been consulted as to whether they desired the auditors to continue to act or not.

(*r*) *Norman* v. *Mitchell*, 5 De G. M. & G. 648; 104 R. R. 244; *Johnson* v. *Little's Iron Agency Co.*, 5 C. D. 687; 46 L. J. Ch. 786; *Goulton* v. *London Architectural &c. Co.*, (1877) W. N. 141. See *Jones* v. *North Vancouver Land Co.*, (1910) A. C. 317; 79 L. J. P. C. 89, where relief was refused on the ground of delay, the plaintiff having been a director of the defendant company.

(*s*) *Lamb* v. *Sambas Rubber Co.*, (1908) 1 Ch. 845; 77 L. J. Ch. 386; *Jones* v. *Pacaya Rubber Co.*, (1911) 1 K. B. 455; 80 L. J. K. B. 155.

(*t*) *Hoole* v. *Great Western Railway Co.*, 3 Ch. 262; 17 L. T. 153; *Charlton* v. *Newcastle and Carlisle Railway Co.*, 7 W. R. 731.

(*u*) *Carlisle* v. *South Eastern Railway Co.*, 1 Mac. & G., p. 699;

holder will not be taken into consideration (*x*). Nor will his motives for complaining be inquired into (*y*). A shareholder may maintain the action, although holding shares in a rival company (*z*). The fact that the action may not have been instituted from the best of motives is not sufficient to debar him from suing (*a*). If, however, a plaintiff purports to sue on behalf of himself and the other shareholders of a company, and it appears that he is the mere puppet and nominee of a rival company, relief will not be given (*b*); but it is otherwise if he purport to sue on behalf of himself personally, and not on behalf of the other shareholders, although he may be a mere puppet of a rival company (*c*).

Plaintiff's motives.

A shareholder cannot, however, institute proceedings on behalf of himself and all other shareholders unless for a purpose in which his interest is identical in a judicial point of view with that of those whom he professes to represent (*d*).

The interest of the plaintiff must be identical with that of those whom he professes to represent.

19 L. J. Ch. 477; 88 R. R. 497; *Fawcett* v *Lawrie*, 1 Dr. & Sm. 192, 202; 8 W. R. 699; *Simpson* v. *Westminster Palace Hotel Co.*, 8 H. L. C. 717; 2 L. T. 707; 125 R. R. 296; *Tomkinson* v. *South Eastern Railway Co.*, 35 C. D. 677; 56 L. J. Ch. 932; *Alexander* v. *Automatic Telephone Co.*, (1900) 2 Ch. p. 69; 69 L. J. Ch. 428; *Towers* v. *African Tug Co.*, (1904) 1 Ch. pp. 566, 571; 73 L. J. Ch. 795; *Mosely* v. *Koffyfontein Mines Co.*, (1911), 1 Ch. p. 84; 80 L. J. Ch. p. 116; affirmed on other grounds, (1911) A. C. 409; 80 L. J. Ch. 668.

(*x*) *McDowell* v. *Grand Canal Co.*, 3 Ir. Ch. 578.

(*y*) *Bloxam* v. *Metropolitan Railway Co.*, 3 Ch. 337, 353; 18 L. T. 41.

(*z*) *Salomons* v. *Laing*, 12 Beav. p. 353; 19 L. J. Ch. 231; 85 R. R. 107; *Winch* v. *Birkenhead, Lancashire, &c., Railway Co.*, 5 De G. & Sm. 581; 90 R. R. 145; *Att.-Gen.* v. *Great Northern Railway Co.*, 1 Dr. & Sm. 159; 2 L. T. 653.

(*a*) *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 4 De G. F. & J. p. 131; 4 L. T. 666; *Bloxam* v. *Metropolitan Railway Co.*, 3 Ch. 337; 18 L. T. 41; *Mutter* v. *Eastern and Midlands Railway Co.*, 38 C. D. pp. 96, 104; 57 L. J. Ch. 615.

(*b*) *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 4 De G. F. & J. p. 130; 4 L. T. 666; *Filder* v. *London, Brighton, &c., Railway Co.*, 1 H. & M. 489; *Bloxam* v. *Metropolitan Railway Co.*, 3 Ch. p. 353; 18 L. T. 41; *Robson* v. *Dodds*, 8 Eq. 305; 38 L. J. Ch. 547.

(*c*) See *Mutter* v. *Eastern and Midlands Railway Co.*, 38 C. D. 92, 104; 57 L. J. Ch. 615; *Davies* v. *Gas Light and Coke Co.*, (1909) 1 Ch. 710; 78 L. J. Ch. 445.

(*d*) *Mozley* v. *Alston*, 1 Ph. 790; 16 L. J. Ch. 217; *Clay* v. *Rufford*, 8 Ha. 281; 90 R. R. 229;

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If he has a distinct and separate interest from that of the rest of the shareholders, he cannot sue on behalf of himself and them (*e*). Thus, although the Court may in an action so framed restrain the directors of a company from declaring a future dividend, it cannot upon an application in this form restrain the payment of a dividend already declared, because, as soon as a dividend has been declared, each shareholder acquires a separate right to his share of the dividend (*f*).

Cannot sue where acquiesced in or retaining benefit of *ultra vires* act.

A man who by his conduct has personally precluded himself from suing cannot maintain the action (*g*); nor can an action be instituted by a shareholder on behalf of himself and all other shareholders, complaining of transactions in which some of them have acquiesced (*h*), or of transactions from which he has derived, and still retains, a benefit (*i*). But a shareholder who has been a party to acts *ultra vires* of the company is not debarred from suing to restrain the commission by the company of further *ultra vires* acts of the same nature (*k*).

Defendants.

Shareholders who have an interest distinct from and opposed to that of the plaintiff should be made parties to an action to restrain the doing of an unlawful act by the company, but if a shareholder complains of an act of the whole company or the executive of the company, there is no necessity for any other shareholders to be represented (*l*). If the

Williams v. *Salmon*, 2 K. & J. 463; 110 R. R. 320. See *Doyle* v. *Muntz*, 5 Ha. 509; 16 L. J. Ch. 51.

(*e*) *Macbride* v. *Lindsay*, 9 Hare, 574; *Pulbrook* v. *Richmond Mining Co.*, 9 C. D. 610, 613; 48 L. J. Ch. 65.

(*f*) *Carlisle* v. *South Eastern Railway Co.*, 1 Mac. & G. 689; 88 R. R. 497; *Fawcett* v. *Laurie*, 1 Dr. & Sm. p. 199; 3 W. R. 699.

(*g*) *Burt* v. *British Nation Life Assurance Association*, 4 De G. & J. 158; *Towers* v. *African Tug Co.*, (1904) 1 Ch. 558; 73 L. J. Ch. 395; *Mosely* v. *Koffyfontein Mines Co.*, (1911) 1 Ch. p. 78; 80 L. J. Ch. p. 115.

(*h*) *Kent* v. *Jackson*, 14 Beav. 367; 2 De G. M. & G. 49; *Stupart* v. *Arrowsmith*, 3 Sm. & G. 176; 25 L. J. Ch. 153; 107 R. R. 70; but see *White* v. *Carmarthen, &c., Railway Co.*, 1 H. & M. 786; 33 L. J. Ch. 93.

(*i*) *Towers* v. *African Tug Co.*, (1904) 1 Ch. 558; 73 L. J. Ch. 395.

(*k*) *Mosely* v. *Koffyfontein Mines Co.*, (1911) 1 Ch. 73; 80 L. J. Ch. 111; affirmed on other grounds, (1911) A. C. 409; 80 L. J. Ch. 668.

(*l*) *Hoole* v. *Great Western Railway Co.*, 3 Ch. p. 277; 17 L. T. 153.

object of the action is to restrain the carrying out of an agreement with other companies, all the companies are necessary parties (*m*).

Acts *ultra vires* company cannot be ratified.

An act *ultra vires* of the company is incapable of ratification, and therefore cannot be made valid by the acquiescence of the shareholders (*n*). But acts *intra vires* as regards the company, although *ultra vires* the directors, may be rendered valid by acquiescence (*o*). Such acquiescence may be inferred from circumstances which satisfy the Court that the thing to be ratified came to the knowledge of all who chose to inquire, and that all the shareholders had full opportunity and means of inquiry (*p*). If the means of knowledge to all appear sufficient so as to raise the presumption of knowledge and acquiescence and the arrangement is left unimpeached for a great number of years, then that which was in its inception invalid will by acquiescence be rendered unimpeachable (*q*). But full knowledge must be shown (*r*); it is not enough to show merely that there was sufficient to arouse attention (*s*). In the absence of full information mere lapse

Acts *ultra vires* directors but *intra vires* company may be rendered valid by acquiescence.

(*m*) *Hare* v. *London and North Western Railway Co.*, 1 J. & H. 253. See 2 J. & H. 80; 30 L. J. Ch. 817; *Maunsell* v. *Midland Great Western Railway Co. of Ireland*, 1 H. & M. 130; 32 L. J. Ch. 513.

(*n*) *Simpson* v. *Westminster Palace Hotel Co.*, 8 H. L. C. 712, 717; 2 L. T. (N. S.) 707; *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 653; 44 L. J. Ex. 185; *Wenlock* v. *River Dee Co.*, 36 C. D. 674; 38 C. D. 534; 57 L. J. Ch. 946; *Towers* v. *African Tug Co.* (1904) 1 Ch. p. 566; 73 L. J. Ch. p. 397; *Mosely* v. *Koffyfontein Mines Co.*, (1911) 1 Ch. p. 84; 80 L. J. Ch. p. 116; affirmed on other grounds, (1911) A. C. 409; 80 L. J. Ch. 668.

(*o*) *Houldsworth* v. *Evans*, L. R. 3 H. L. 263; 37 L. J. Ch. 800; *Spackman* v. *Evans*, L. R. 3 H. L. 190, 191; 37 L. J. Ch. 752 and see *Ho Tung* v. *Man On Insurance Co.*, (1902) A. C. 232; 71 L. J. P. C. 46; *Att.-Gen. for Canada* v. *Standard Trust Company of New York*, (1911) A. C. 498, 504; 80 L. J. P. C. p. 192.

(*p*) *Phosphate of Lime Co.* v. *Green*, L. R. 7 C. P. 43; 25 L. T. 636; and see *Ho Tung* v. *Man On Insurance Co.*, (1902) A. C. p. 236; 71 L. J. P. C. 46.

(*q*) *Evans* v. *Smallcombe*, L. R. 3 H. L. 249; 37 L. J. Ch. 793; *Houldsworth* v. *Evans*, L. R. 3 H. L. 263; 37 L. J. Ch. 800; *Ho Tung* v. *Man On Insurance Co.*, *supra*.

(*r*) *Ashbury* v. *Watson*, 30 C. D. 376; 54 L. J. Ch. 985.

(*s*) *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. p. 681; 44 L. J. Ex. 185; *Blackburn Building Society* v. *Brooks*, 29 C. D. 902, 910; 54 L. J. Ch. 1091.

of time cannot grow into acquiescence. Length of time may, in many cases, materially assist in establishing acquiescence: but it is not the time, but the acquiescence, which changes what would otherwise be a void act into a valid one (*t*).

Where it is sought to establish an invalid transaction as having been rendered valid by acquiescence, it must be shewn to come strictly within the terms of the arrangement which was communicated to and acquiesced in by the shareholders (*u*).

Injunction at suit of shareholder on behalf of himself and all others to restrain acts *ultra vires*.

In interfering by injunction at the suit of a shareholder suing on behalf of himself and all other members of the company to restrain a company, formed for a special purpose, from doing acts or entering into engagements which are not within the proper purposes for which it was established, the Court not only enforces the equitable relations which subsist between the members *inter se*, but acts in aid of the legal right. The suit by a shareholder to restrain a company from doing illegal acts or entering into engagements which are beyond the proper purposes of the company may be in form on behalf of all the shareholders. It is immaterial that some of the shareholders may be opposed to the suit (*x*).

Injunctions to restrain improper application of company's funds.

Injunctions have been granted at the suit of a shareholder suing on behalf of himself and all other shareholders to restrain a railway company from applying the funds of the company towards the establishment of a steam packet company in connection with the railway or from carrying on the business of omnibus proprietor (*z*); [illegible] shares in another railway company (*a*); companies have been restrained from applying [illegible] the purpose of completing a particular [illegible]

(*t*) *Evans* v. *Smallcombe*, L. R. 3 H. L. p. 260; 37 L. J. Ch. 793.

(*u*) *Houldsworth* v. *Evans*, L. R. 3 H. L. 263; 37 L. J. Ch. 800.

(*x*) *Beman* v. *Rufford*, 1 Sim. N. S. 550, 564; 20 L. J. Ch. 527; *White* v. *Carmarthen R. Co.*, 1 H. & M. 786; 3 L. J. Ch. 92.

(*y*) *Colman* v. *Eastern Counties Railway Co.*, 10 Beav. 1; Ch. 73; 7 R. R. 78; *Manchester Sheffield, &c. shire Railway Co.* 30 Beav. 10; L. T. 666.

(*z*) *Attorney-General* v. *Mersey Railway Co.*, (1907) A. C. 415; 76 L. J. Ch. 568.

(*a*) [illegible] v. *Lewis*, 2 Beav.

of any part of the main line (*b*), and from applying the corporate funds in the construction of part only of the line or other use, with the view and purpose of completing the whole (*c*). However, in a somewhat similar case, it appeared that greater mischief would arise from granting than withholding the injunction, the Court refused to interfere (*d*). So also a railway company was restrained from subscribing a sum to the Imperial Institute, notwithstanding that the success of the undertaking would greatly increase the company's traffic (*e*).

So a company cannot apply its funds in paying dividends out of capital even though the memorandum or articles authorise it, or in making a return of capital to shareholders otherwise than in accordance with the provisions of the Companies Acts (*f*), or in the payment of commission without complying with the requirements of sect. 89 of the Companies (Consolidation) Act, 1908 (*i*); or in making presents to the directors (*k*), or in paying them

Ch. 225; 85 R. R. 107.

(*b*) *Oxenham* v. *Eastern Union Ry. Co.*, 2 Mac. & G. 389; 19 L. J. Ch. 10; 86 R. R. 148.

v. *Wilkinson*, 12 Beav. 486; 18 L. J. Ch. P. R.

son v. *Earl of Powis*, 1 M. G. 14; 21 L. J. Ch. 17; R. 130.

(*c*) *Tomkinson* v. *South Eastern Railway Co.*, 35 C. D. 678; 56 L. J. Ch. 932.

(*d*) *Fawcett* v. *Laurie*, 1 Dr. & Sm. 192; 8 W. R. 699; *Macdougall* v. *Jersey Imperial Hotel Co.*, 2 H. & M. 528; 34 L. J. Ch. 28; *Flitcroft's Case*, 21 C. D. 519; 52 L. J. Ch. 155; *In re Sharpe*, (1892) 1 Ch. 154; 61 L. J. Ch. 193; *Bury* v. *Famitima Development Co.*, (1909) 1 Ch. 754, 760; 78 L. J. Ch. 508; (1910) A. C. 439; 79 L. J. Ch. 597. See Table A., art. 97, Companies Act, 1908, and the Companies Clauses Act, 1845, s. 121 [illegible] payment of interest out of [illegible] Companies Act, 1908, s.

(*g*) *Verner* v. *General and Commercial Investment Trust*, (1894) 2 Ch. p. [illegible] J. Ch. p. 461.

(*h*) *Moxham* v. *Grant*, 1 Q. B. 88; 69 L. J. Q. B. 57.

(*i*) See *Booth* v. *New Afrikander Gold Mining Co.*, (1903) 1 Ch. 295; 72 L. J. Ch. 125; *Barrow* v. *Paringa Mines Co.*, (1909) 2 Ch. 658; 78 L. J. Ch. 723; *Dominion of Canada Trading Syndicate* v. *Brigstock*, (1911) 2 K. B. 648; 80 L. J. K. B. 1344.

(*k*) *York and North Midland Railway Co.* v. *Hudson*, 16 Beav. 485; 22 L. J. Ch. 529; 96 R. R. 228; *In re George Newman & Co.*, (1895) 1 Ch. 674; 64 L. J. Ch. 407; and see *Young* v. *Naval and Military, &c., Society*, (1905) 1 K. B. p. 693; 74 L. J. K. B. p. 304.

their travelling expenses of attending board meetings in addition to their remuneration (*l*); or in the prosecution of an action in which the company are not plaintiffs (*m*); or in payment of the costs of a prosecution for libel against a former secretary of the committee of the company (*n*); or in payment of the costs of an unsuccessful petition for winding up the company presented by the directors, but opposed by a number of the shareholders and a minority of the directors, and of the costs of an appeal from the dismissal of such petition (*o*).

A limited company formed under the Companies Acts cannot purchase its own shares, although authorised by its regulation, as such a transaction amounts to an unauthorised reduction of capital (*p*). Upon the same principle, a surrender to a limited company by shareholders of partly paid shares in the company is, in effect, a transaction of purchase and sale, the company purchasing the shares in consideration of discharging the shareholders from liability to calls; and such a transaction is therefore invalid (*q*). But a surrender of old shares in exchange for new shares which does not involve any reduction of capital is valid (*r*). So also, a limited company governed by the Companies Acts cannot issue its shares at a discount (*s*); but it is otherwise in the case of

(*l*) *Young* v. *Naval and Military, &c., Society*, (1905) 1 K. B. 687; 74 L. J. K. B. 302. See *Marmor & Co.* v. *Alexander*, (1908) S. C. 78.

(*m*) *Kernaghan* v. *Williams*, 6 Eq. 228. See *Studdert* v. *Grosvenor*, 33 C. D. p. 536; 55 L. J. Ch. 689.

(*n*) *Pickering* v. *Stephenson*, 14 Eq. 341. The costs of the prosecution of an action for libel carried on in the interests of the company are properly payable out of the funds of the company. *Studdert* v. *Grosvenor*, 33 C. D. 528; 55 L. J. Ch. 689; and see *Breay* v. *Royal British Nurses Association*, (1897) 2 Ch. 272; 66 L. J. Ch. 587.

(*o*) *Smith* v. *Duke of Manchester*, 24 C. D. 611; 53 L. J. Ch. 96.

(*p*) *Trevor* v. *Whitworth*, 12 A. C. 409; 57 L. J. Ch. 28. See *Rowell* v. *John Rowell & Co.*, (1912) 2 Ch. 609; 81 L. J. Ch. 759; *In re Irish Provident Assurance Co.*, (1913) 1 I. R. 352, 370. As to the power of an unlimited company to return capital to its shareholders, see *Borough Commercial Society*, (1893) 2 Ch. 242; 62 L. J. Ch. 456.

(*q*) *Bellerby* v. *Rowland and Marwood Steamship Co.*, (1902) 2 Ch. 14; 70 L. J. Ch. 616; see *Rowell* v. *John Rowell & Co.*, (1912) 2 Ch. 609; 81 L. J. Ch. 759.

(*r*) *Rowell* v. *John Rowell & Co.*, *supra*.

(*s*) *In re Almada and Tirito Co.*, 38 C. D. 415; 57 L. J. Ch. 706;

companies governed by the Companies Clauses Acts (*t*). Companies whether governed by the Companies Acts, or the Companies Clauses Acts, may however issue debentures at a discount (*u*). But a company was restrained from issuing debentures at a discount with a right to the holder to exchange them for fully paid shares of the nominal value of the debentures, the transaction involving the issue of shares at a discount (*x*).

Injunction to restrain infringement of preference shareholders' rights.

The payment of dividends on the ordinary stock of a company until the arrears of dividend on preference shares, created under the provisions of an Act of Parliament, shall have been successively paid according to their priorities (*y*) out of the profits accruing subsequently to the date of the arrears (*z*), is improper, and will be restrained by injunction. The fact that the owner of preference shares may have in former years acquiesced in a declaration of a dividend on the ordinary shares, whilst there was an arrear of dividend due on the preference shares, will not deprive him of his right in respect of subsequent arrears, though it will preclude him from making any claim in respect of these particular arrears (*a*). A preferential shareholder may bring an action

Ooregum Co. v. *Roper*, (1892) A. C. 125; 61 L. J. Ch. 337; *Welton* v. *Saffery*; (1897) A. C. 299; 66 L. J. Ch. 362; *Mosely* v. *Koffyfontein Mines Co.*, (1904) 2 Ch. 108; 73 L. J. Ch; 569. See Companies Act, 1908, s. 89, as to payment of commission to subscribers for shares.

(*t*) *Webb* v. *Shropshire, &c., Railway Co.*, (1893) 3 Ch. 307; 63 L. J. Ch. 80; *Statham* v. *Brighton Marine Palace Co.*, (1899) 1 Ch. 199; 68 L. J. Ch. 172.

(*u*) *Campbell's Case*, 4 C. D. 470; 35 L. T. 900; *Webb* v. *Shropshire, &c., Railway Co., supra*; *Mosely* v. *Koffyfontein Mines Co.*, (1904) 2 Ch. p. 119; 73 L. J. Ch. p. 575.

(*x*) *Mosely* v. *Koffyfontein Mines Co.*, (1904) 2 Ch. 108; 73 L. J. Ch. 569.

(*y*) *Crawford* v. *North Eastern Railway Co.*, 3 K. & J. 733.

(*z*) *Stevens* v. *South Devon Railway Co.*, 9 Ha. 325; 21 L. J. Ch. 816; 89 R. R. 460; *Henry* v. *Great Northern Railway Co.*, 1 De G. & J. 606; 27 L. J. Ch. 1; 118 R. R. 255. As to when preference shares entitle the holders thereof to cumulative preferential dividends, see *Webb* v. *Earle*, 20 Eq. 556; 44 L. J. Ch. 608; *Staples* v. *Eastman Photographic Co.*, (1896) 2 Ch. 303; 65 L. J. Ch. 682; *Foster* v. *Coles*, (1906) W. N. 107; 22 T. L. R. 555; *Adair* v. *Old Bushmills Distillery Co.*, (1908) W. N. 24.

(*a*) *Matthews* v. *Great Northern Railway Co.*, 28 L. J. Ch. 375.

to restrain a company from declaring or paying a dividend prejudicial to his rights and interests (*b*).

Expenses of bills in Parliament.

The application of the funds of a company in paying the expenses of a bill in Parliament is improper, unless specially authorised by the Act or any Acts incorporated therewith (*c*). "The intended application," said Turner, L.J., in *Simpson* v. *Denison* (*d*), "is for another and a different purpose from that which is described in the Act under which the company is formed, and which constitutes the partnership deed of the company" (*e*). Accordingly railway companies have been restrained from applying any part of their funds towards the expenses incident to an application to Parliament for the promotion of a branch line (*f*), or a new line in extension of the existing one (*g*), for the improvement of the navigation of a river communicating by means of a branch line with the main line (*h*), or for the purpose of bringing about an alteration in the constitution of the company (*i*), or for the purpose of carrying out an arrangement with another company (*k*), or for the purpose of conferring further powers on the company, even although the application to Parliament had been pursuant to a resolution passed by three-fourths of the shareholders in compliance with the Wharncliffe order (*l*). The application of the funds of a company towards making up the parliamentary deposit required for bills in Parliament promoted by another company (*m*), or towards repaying

(*b*) *Sturge* v. *Eastern Union Railway Co.*, 7 De G. M. & G. 158.

(*c*) *Stevens* v. *South Devon Railway Co.*, 13 Beav. 59; 88 R. R. 418.

(*d*) 10 Ha. 62; 90 R. R. 276.

(*e*) *East Anglian Railway Co.* v. *Eastern Counties Railway Co.*, 11 C. B. 775; 21 L. J. C. P. 23; 87 R. R. 783; *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 653; 44 L. J. Ex. 185.

(*f*) *Great Western Railway Co.* v. *Rushout*, 5 De G. & Sm. 309; 90 R. R. 70.

(*g*) *Vance* v. *East Lancashire Railway Co.*, 3 K. & J. 50; 112 R. R. 25.

(*h*) *Munt* v. *Shrewsbury and Chester Railway Co.*, 13 Beav. 1; 20 L. J. Ch. 169; 88 R. R. 403; *East Anglian Railway Co.* v. *Eastern Counties Railway Co.*, 11 C. B. 775; 21 L. J. C. P. 23; 87 R. R. 783.

(*i*) *Stevens* v. *South Devon Railway Co.*, 13 Beav. 48; 88 R. R. 418.

(*k*) *Simpson* v. *Denison*, 10 Ha. 51; 20 L. T. (O. S.) 46; 90 R. R. 276.

(*l*) *Caledonian Railway Co.* v. *Solway Junction Railway Co.*, W. N. (1883) 179; 49 L. T. 527.

(*m*) *Maunsell* v. *Midland Great Western Railway Co. of Ireland*, 1 H. & M. 130; 32 L. J. Ch. 513.

monies borrowed by the promoters, and subscribed by them in conformity with the standing orders of Parliament (*n*), is improper.

The funds of a corporation may, however, be applied in discharging expenses incurred in opposing in Parliament a bill, which would, if sanctioned, be injurious to the company's interests (*o*).

The distinction between going to Parliament for an alteration of the constitution, or a variation or extension of the powers of a company, and applying the funds of the company towards the payment of the expenses thereby incurred is a well-defined one (*p*). Every company acting in its corporate capacity has full power to make an application to Parliament for these or other purposes. There is no ground on which a Court of equity can interfere (*q*). Thus the Court would not restrain a company incorporated under the laws of a foreign country from applying to the legislature of that country, even though nearly all the shareholders were resident in England, there appearing to be no intention on the part of the company to act except with the sanction of the foreign legislature (*r*). So also the Court refused to restrain a railway company, which had taken lands of the plaintiff under their compulsory powers for the purpose of making a railway, from making an application to Parliament upon the abandonment of the railway to enable them to use the land for a different purpose and in a different undertaking (*s*).

(*n*) *Spackman* v. *Lattimore*, 3 Giff. 16.

(*o*) *Bright* v. *North*, 2 Ph. 216; 78 R. R. 74; *Att.-Gen.* v. *Andrews*, 2 Mac. & G. 230; 20 L. J. Ch. 467; 86 R. R. 79; see *Att.-Gen.* v. *Mayor of Wigan*, 5 De G. M. & G. 54; 23 L. J. Ch. 429; 104 R. R. 22; *Att.-Gen.* v. *Mayor of Brecon*, 10 C. D. 204; 48 L. J. Ch. 153; and *Att.-Gen.* v. *Swansea Corporation*, (1898) 1 Ch. p. 606; 67 L. J. Ch. 356; *Leith Council* v. *Leith Harbour Commissioners*, (1899) A. C. p. 516; 68 L. J. P. C. 109; *Brooks Jenkins* v. *Torquay Corporation*, (1902) 1 K. B. p. 609; 71 L. J. K. B. 109; *Att.-Gen.* v. *Thomson*, (1913) 3 K. B. p. 208.

(*p*) *Simpson* v. *Denison*, 10 Ha. p. 61; 90 R. R. 276; *Stevens* v. *South Devon Railway Co.*, 13 Beav. 48; 88 R. R. 418.

(*q*) *Vance* v. *East Lancashire Railway Co.*, 3 K. & J. 57; *Stevens* v. *South Devon Railway Co.*, *supra*.

(*r*) *Bill* v. *Sierra Nevada Co.*, 1 De G. F. & J. 177, 183; 29 L. J. Ch. 176; 125 R. R. 396.

(*s*) *Astley* v. *Manchester, Sheffield,*

The Court will not take into consideration the possibility of further powers being obtained.

When a public copany incorporated by Statute is engaging in a transaction which is *ultra vires*, the Court can only deal with the case as it exists, and will not take into consideration the possibility of further powers being obtained by the company (*t*). In a recent case (*u*) in which a company was promoting a bill in Parliament to secure power to do the act complained of, the Court suspended for seven months the operation of an injunction restraining the *ultra vires* act.

Contracts not within the proper purposes of the company are void at law.

Where a contract is one which, from the nature and object of incorporation, a corporate body is by necessary or reasonable inference from the provisions of the deed of settlement or the Act prohibited from making, it is *ultra vires* and void (*x*). "Where a corporation is created by Act of Parliament for particular purposes with special powers, their deed, though under their corporate seal, does not bind them, if it appear by the express provisions of the Statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed is *ultra vires;* that is, that the legislature meant that such a deed should not be made" (*y*).

The doctrine of *ultra vires* applied reasonably.

The doctrine of *ultra vires* must, however, be reasonably understood and applied, and whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires* (*z*). Thus a company incorporated for the purpose of

and Lincolnshire Railway Co., 2 De G. & J. 463; 27 L. J. Ch. 478; 119 R. R. 207.

(*t*) *Great Western Railway Co.* v. *Metropolitan Railway Co.*, 32 L. J. Ch. 382.

(*u*) *Att.-Gen.* v. *South Staffordshire Waterworks Co.*, (1909) 25 T. L. R. 408.

(*x*) *Shrewsbury and Birmingham Railway Co.* v. *London and North Western Railway Co.*, 6 H. L. C. 136; 26 L. J. Ch. 482; 108 R. R. 46; *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 673; 44 L. J. Ex. 185; *Att.-Gen.* v. *Great Eastern Railway Co.*, 5 A. C. p. 481; 49 L. J. Ch. 545; *Wenlock* v. *River Dee Co.*, 10 A. C. 360; 54 L. J. Q. B. 577; *Corbett* v. *South Eastern and Chatham Railways*, (1906) 2 Ch. 20; 75 L. J Ch. 485.

(*y*) *South Yorkshire Railway Co. and River Don Navigation Co.* v. *Great Northern Railway Co.*, 9 Exch. 55, 84; 22 L. J. Ex. 305, 314; 96 R. R. 550; *Chambers* v. *Manchester and Milford Railway Co.*, 5 B. & S. 588; 33 L. J. Q. B. 268.

(*z*) *Att.-Gen.* v. *Great Eastern Railway Co.*, 5 A. C. p. 478; 49 L. J. Ch. 545; *London and North*

keeping a hotel was held entitled to lease part of the hotel for a short term of years to the head of a government department (*a*). So also a colliery company, which had purchased land for the purpose of erecting cottages for its miners, was held entitled to sell the land to a purchaser who had agreed to erect the cottages and let them to the company (*b*). So also a railway and steam ferry company may lend out its ferry boats on excursion trips, when not wanted for the ferry (*c*). So also a railway company may charge not only its customers, but also the public generally, for the use of its scales for weighing coal (*d*). So also a railway company may sell water on its land not required for the working of its undertaking (*e*). So also a contract between a railway company and a person to run a steamer between the terminus of the railway in England and the coast of Ireland was held valid, as being in furtherance of the object for which the company was formed and incorporated, viz., to facilitate communication between England and Ireland (*f*). So also the directors of a fire insurance company may, in the exercise of their discretion, make payments to persons insured in respect of losses not falling strictly within the terms of the policies, if such payments are conducive to the welfare of the company and calculated to promote its interest, or if the payment of such losses is in accordance with the usual custom of other insurance companies (*g*). So also a company may grant a

Western Railway Co. v. *Price*, 11 Q. B. D. p. 487; 52 L. J. Q. B. 754; *In re Kingsbury Collieries Co. and Moore's Contract*, (1907) 2 Ch. p. 268; 76 L. J. Ch. p. 471.

(*a*) *Simpson* v. *Westminster Palace Hotel Co.*, 8 H. L. C. 712; 2 L. T. (N. S.) 707; 125 R. R. 296; *Featherstonhaugh* v. *Lee Moor Porcelain Co.*, 1 Eq. 318, 329; 35 L. J. Ch. 84.

(*b*) *In re Kingsbury Colliery Co. and Moore's Contract*, (1907) 2 Ch. 259; 76 L. J. Ch. 469.

(*c*) *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 30 Beav. 40, affirmed on other grounds, 4 De G. F. & J. 126.

(*d*) *London and North Western Railway Co.* v. *Price*, 11 Q. B. D. 485, 488; 52 L. J. Q. B. 754.

(*e*) *Wilson* v. *Great Western Railway Co.*, (1910) 128 L. T. Journal, 340.

(*f*) *South Wales Railway Co.* v. *Redmond*, 10 C. B. N. S. 675; 4 L. T. 619. See *Warden of Dover Harbour* v. *South Eastern Railway Co.*, 9 Ha. 489; 21 L. J. Ch. 886 (user of buildings for customs-house).

(*g*) *Taunton* v. *Royal Insurance*

pension to its retired officer or servant (*h*), provided the company is not being wound up (*i*).

Where the primary and special objects for which a company has been formed are gone, it cannot continue to carry on business for objects which are merely ancillary and subservient to the main objects (*k*). A company's memorandum of association frequently contains wide general words which, if construed literally, would entitle the company to carry on almost any kind of business. But such words "must be taken within certain limits, and those limits are that they must *primâ facie* be regarded as ancillary to the purport of the scheme for which the company was formed" (*l*). General words in a memorandum of association must be construed in such a way "as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shown by the context to be the dominant or main object. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are" (*m*). This principle of construction has been adopted in a case where the memorandum contained a clause that the objects specified in each paragraph were to be in no

Construction of objects clause of memorandum.

Co., 2 H. & M. 135; 33 L. J. Ch. 406; and see *Breay* v. *Royal British Nurses Association*, (1897) 2 Ch. 277, 278; 66 L. J. Ch. 587; *Cyclists' Touring Club* v. *Hopkinson*, (1910) 1 Ch. 186, 187; 79 L. J. Ch. 86.

(*h*) *Henderson* v. *Bank of Australia*, 40 C. D. 170; 58 L. J. Ch. 197; *Normandy* v. *Ind, Coope & Co.*, (1908) 1 Ch. p. 104; 77 L. J. Ch. p. 88; *Cyclists' Touring Club* v. *Hopkinson* (1910) 1 Ch. 179; 79 L. J. Ch. p. 87; see *In re Birkbeck Benefit Building Society*, (1913) 1 Ch. 400; 82 L. J. Ch. 232.

(*i*) *Hutton* v. *West Cork Railway Co.*, 23 C. D. 654; 52 L. J. Ch. 689; *Stroud* v. *Royal Aquarium, &c., Society* (1903), 89 L. T. 243; W. N. 146; see *In re Birkbeck Benefit Building Society*, *supra*.

(*k*) *In re Haven Gold Mining Co.*, 20 C. D. 151; 51 L. J. Ch. 242; *In re Amalgamated Syndicates*, (1897) 2 Ch. 600; 66 L. J. Ch. 783; *In re Coolgardie Consolidated Gold Mines Co.*, 76 L. T. 269; *Stephens* v. *Mysore Reefs (Kaugundy) Mining Co.*, (1902) 1 Ch. 745; 76 L. J. Ch. 295.

(*l*) *In re German Date Coffee Co.*, 20 C. D. p. 187; 51 L. J. Ch. 464; *Pellar* v. *Road Block Gold Mines Co.*, (1905) 2 Ch. p. 439; 74 L. J. Ch. 753.

(*m*) *In re German Date Coffee Co.*, 20 C. D. p. 188; 51 L. J. Ch. 464.

wise limited or restricted by reference to, or inference from, the terms of any other paragraph, or the name of the company (*n*). But if it appears from the memorandum read as a whole that the company contemplates several primary objects, the company's powers will not be restricted by reference to the objects contained in the first sub-clause of clause 3 of the memorandum, or to the name of the company (*o*).

Working agreements between railway companies

A traffic agreement between two railway companies for a certain number of years to divide the profits of the whole traffic in certain fixed proportions calculated on the past course of traffic, and entered into *bonâ fide* for the purpose of avoiding competition, is not *ultra vires* (*p*); and a breach of such an agreement will be restrained by injunction (*q*). The managing body of a railway company, however, have no power to enter into a contract fixing and regulating the future traffic which may be carried upon a line of railway, which the company may be thereafter empowered to construct, so as to give another company an interest in such traffic and profit (*r*). In a recent case an agreement between two railway companies to pool their income, and an agreement for the joint working of the two companies, as distinct from the working of the two lines by one of the companies, was held *ultra vires* (*s*).

In a case where a railway company was authorised to enter into an agreement with another railway company for working the line it was held that they might manufacture carriages and rolling stock for and let them for hire to the other company (*t*).

(*n*) *Stephens* v. *Mysore Reefs (Kangundy) Mining Co.*, (1902) 1 Ch. 745; 76 L. J. Ch. 295.

(*o*) *Pedlar* v. *Road Block Gold Mines Co.*, (1905) 2 Ch. 427; 74 L. J. Ch. 753; *Butler* v. *Northern Territories Mines of Australia* (1907), 96 L. T. 41; 23 T. L. R. 179.

(*p*) *Hare* v. *London and North Western Railway Co.*, 2 J. & H. 80; 30 L. J. Ch. 817.

(*q*) *Midland Railway Co.* v. *Great Western Railway Co.*, 8 Ch. 841; 42 L. J. Ch. 438; see *Great Central Railway Co.* v. *Midland Railway Co.* (1912), 1 Ch. 214, 218; 105 L. T. 843; affirmed (1913) W. N. 294 (H. L.).

(*r*) *Midland Railway Co.* v. *London and North Western Railway Co.*, 2 Eq. 525; 35 L. J. Ch. 831.

(*s*) *In re Great Northern Railway Co. and the Great Central Railway Co.* (1908), 24 T. L. R. 417.

(*t*) *Att.-Gen.* v. *Great Eastern Railway Co.*, A. C. 478; 49 L. J. Ch. 545.

Agreement to apply to Parliament for powers.

An agreement between two railway companies to make a application to Parliament for the necessary powers to carr out certain heads of agreement between them, which are no to be acted on until the necessary powers have been obtained is not illegal (*u*); but any attempt to act upon the agree ment before the necessary powers have been obtained i illegal (*x*).

Agreement legal in part but illegal in its purpose.

An agreement cannot be considered legal, though some o the terms involve acts which may be lawfully done, if th purpose of the agreement be to work out something illegal Therefore where railway companies agree to do acts whic they have power to do, as well as others which they have n power to do, their object being to carry out an illegal scheme the Court will restrain the agreement from being acted upo at all (*y*).

Agreement partly legal, partly illegal.

A shareholder in a company, the directors of which hav affixed the company's seal to an agreement some of the pro visions whereof are illegal, is entitled to restrain the director from acting upon the agreement so far as it is illegal (*z*).

Court will not aid either of the parties to an illegal agreement.

If a contract between two companies is illegal, the Cour will not assist either of the parties in obtaining a collatera benefit which the agreement would give, or aid them in an manner which would promote the object of the agreement (*a*)

Court will not as a rule interfere in matters which are properly a subject for internal regulation.

An act, although it may be beyond the powers of th directors or managing body of a company, may be capabl of being adopted and confirmed at a meeting of the share holders. If so, the question is properly a subject of interna regulation and management, and the Court will not interfer until all reasonable attempts have been made to take the sens of the general body of the shareholders on the matters in question. Before applying to the Court, all the means

(*u*) *Winch* v. *Birkenhead, &c., Railway Co.*, 5 De G. & Sm. 562; 90 R. R. 145.

(*x*) *Hattersley* v. *Lord Shelburne*, 31 L. J. Ch. 873.

(*y*) Ib.

(*z*) *Maunsell* v. *Midland Great Western Railway Co. of Ireland*, 1 H. & M. 133; 32 L. J. Ch. 513.

(*a*) *Great Northern Railway Co* v. *Eastern Counties Railway Co.* 9 Ha. 306; 21 L. J. Ch. 837; 8 R. R. 456; *Richmond Waterwork Co.* v. *Vestry of Richmond*, 3 C. D p. 98; 45 L. J. Ch. 441.

provided by the articles, the deed of settlement, or the Act of Incorporation, as the case may be, for the purpose of bringing the matter before the general body of the shareholders must be resorted to and exhausted (*b*). Accordingly where two members of an incorporated company had filed a bill against the directors and others, charging them with fraudulent and illegal acts and praying for the appointment of a receiver, the Court refused to interfere on the ground that the acts complained of were capable of confirmation, and that it did not appear that any attempt had been made to bring the matter before the general body of the shareholders (*c*). So also, and upon the same grounds, in an action brought by certain shareholders to restrain persons alleged to have been irregularly appointed directors from acting as such, the Court refused to interfere (*d*). In like manner the Court refused to restrain directors from excluding one of their number from acting when the majority of the members of the company did not wish him to act (*e*). So also where the directors of a company refused to allow its auditors to examine the company's books, the Court would not grant an interlocutory injunction to compel the directors and the company to give the auditors access to the books, holding that a meeting of the shareholders should be held to ascertain whether they desired the auditors to continue to act or not (*f*). So also the Court

(*b*) *Mozley* v. *Alston*, 1 Ph. 800; 16 L. J. Ch. 217; 65 R. R. 520; *Lord* v. *Copper Mining Co.*, 2 Ph. 740; 18 L. J. Ch. 65; 78 R. R. 270; *Macdougall* v. *Gardiner*, 1 C. D. p. 21; 45 L. J. Ch. 27; *Burland* v. *Earle*, (1902) A. C. 83, 93; 71 L. J. P. C. 1; *Campbell* v. *Australian Mutual Provident Society*, (1908) 77 L. J. P. C. 117; 99 L. T. 3; *Normandy* v. *Ind, Coope & Co.*, (1908) 1 Ch. 84, 107; 77 L. J. Ch. 82; *Dominion Cotton Mills Co.* v. *Amyot*, (1912) A. C. 546, 552; 81 L. J. P. C. 233; *Cuff* v. *London and County Land and Building Co.*, (1912) 1 Ch. p. 449; 81 L. J. Ch. p. 431; as to the exceptions to the rule, see *infra*, p. 575.

(*c*) *Foss* v. *Harbottle*, 2 Hare, 461; 62 R. R. 185.

(*d*) *Mozley* v. *Alston*, 1 Ph. 790; 16 L. J. Ch. 217; 65 R. R. 520; *Hattersley* v. *Lord Shelburne*, 31 L. J. Ch. 873; *Harben* v. *Philippe*, 23 C. D. 14; 48 L. T. 334; *Imperial Hydropathic Hotel Co.* v. *Hampson*, 23 C. D. 1; 49 L. T. 147.

(*e*) *Bainbridge* v. *Smith*, 41 C. D. 462; 60 L. T. 879; see *Cuff* v. *London and County Land and Building Co.*, (1912) 1 Ch. 450; 81 L. J. Ch. 426.

(*f*) *Cuff* v. *London and County*

will not interfere for the purpose of forcing companies to conduct their business according to the strictest rules where the irregularity complained of can be set right at any moment, as for instance where there has been some informality in summoning a board (*g*), or in the appointment of the directors (*h*). So also the Court has refused to interfere with the decision of directors as to what part of the company's profits should be carried to the credit of its reserve fund, and what part should be distributed (*i*). So also the Court has refused to interfere with the directors' under-valuation of the company's assets in the balance-sheet, which had been approved by the company in general meeting (*k*); so also the Court has refused to restrain the payment of a dividend by a railway company before its works were completed (*l*), or before its unsecured debts were paid (*m*). So also the Court will not restrain a company from making a call, if made in a proper form and for a proper purpose (*n*), or from enforcing it (*o*), even in a case where the shareholder has commenced an action to try the question as to his liability (*p*).

So also the Court will not restrain the application of monies raised by the issue of new shares to a purpose different from that for which they were raised (*q*); or the reissue of certain unissued shares to directors at a price below their true value, notwithstanding that the resolution of the company in general meeting authorising the issue was carried by the votes of the directors who held a majority of the shares in the com-

Land and Building Co., (1912) 1 Ch. 440; 81 L. J. Ch. 426.

(*g*) *Browne* v. *La Trinidad*, 37 C. D. 1; 57 L. J. Ch. 292.

(*h*) *Mozley* v. *Alston*, 1 Ph. 790; 16 L. J. Ch. 217; 65 R. R. 520.

(*i*) *Burland* v. *Earle*, (1902) A. C. 83; 71 L. J. P. C. 1.

(*k*) *Young* v. *Brownlee & Co.*, (1911) S. C. 677.

(*l*) *Browne* v. *Monmouthshire Railway Co.*, 13 Beav. 32; 20 L. J. Ch. 497; 88 R. R. 408.

(*m*) *Stevens* v. *South Devon Railway Co.*, 9 Ha. 313; 21 L. J. Ch. 816; 89 R. R. 460.

(*n*) *Cooper* v. *Shropshire Union Railway Co.*, 6 Ra. Ca. 136; *Bailey* v. *Birkenhead, Lancashire, and Cheshire Junction Railway Co.*, 12 Beav. 433; 19 L. J. Ch. 377; 88 R. R. 138.

(*o*) *Anglo-Universal Bank* v. *Baragnon*, 45 L. T. 362.

(*p*) *Tatham* v. *Palace Restaurant Co.* (1909), 53 S. J. 743.

(*q*) *Yetts* v. *Norfolk Railway Co.*, 3 De G. & Sm. 293.

pany (*r*); or the application by the directors of a portion of the funds in gratuities to servants of the company for services rendered (*s*), provided that the company is a going concern (*t*); or in paying a pension to the family of a deceased officer (*u*), or retired secretary (*x*) of the company, or in paying a sum in compromise of an action against the company (*y*) or in satisfaction of a claim which could not have been legally enforced (*z*).

Nor will the Court interfere to restrain a meeting of the shareholders of a company from being held upon the ground that the notice calling it is so expressed that consistently with its terms resolutions might be passed which are *ultra vires* (*a*).

When the Court will interfere in matters of internal regulation.

If, however, it is absolutely necessary that the Court should interfere to prevent irreparable mischief from being done before the time for taking the necessary steps to call a general meeting of the shareholders can arrive (*b*), or if the directors are adopting a particular course for the express purpose of preventing the free action of the shareholders (*c*); or if the directors, or a majority of the shareholders, are acting in an illegal, fraudulent, or oppressive manner against the minority (*d*), the Court will interfere.

(*r*) *Ving* v. *Robertson & Woodcock, Ltd.* (1912), 56 S. J. 412; see *Dominion Cotton Mills Co.* v. *Amyot*, (1912) A. C. p. 553; 81 L. J. P. C. p. 236.

(*s*) *Hampson* v. *Price's Patent Candle Co.*, 24 W. R. 754.

(*t*) *Hutton* v. *West Cork Railway Co.*, 23 C. D. 654; 52 L. J. Ch. 689; *Stroud* v. *Royal Aquarium Co.*, (1903) W. N. 146; 89 L. T. 243; *Warren* v. *Lambeth Waterworks* (1905), 21 T. L. R. 685.

(*u*) *Henderson* v. *Bank of Australasia*, 40 C. D. 170; 59 L. J. Ch. 794.

(*x*) *Cyclists' Touring Club* v. *Hopkinson*, (1910) 1 Ch. 179; 79 L. J. Ch. 82 (association not for profit).

(*y*) *Yates* v. *Cyclists' Touring Club* (1908), 24 T. L. R. 581.

(*z*) *Taunton* v. *Royal Insurance Co.*, 2 H. & M. 135, 141; 33 L. J. Ch. 406.

(*a*) *Isle of Wight Railway Co.* v. *Tahourdin*, 25 C. D. 320, 334; 53 L. J. Ch. 353; see *Fruit and Vegetable Growers Association* v. *Kekewich*, (1912) 2 Ch. 57; 81 L. J. Ch. 499.

(*b*) *Great Western Railway Co.* v. *Rushout*, 5 De G. & Sm. 310; 90 R. R. 87; *Normandy* v. *Ind, Coope & Co.*, (1908) 1 Ch. p. 108; 77 L. J. Ch. 82.

(*c*) *Fraser* v. *Whalley*, 2 H. & M. 10; 11 L. T. 175; *Cannon* v. *Trask*, 20 Eq. 669; 44 L. J. Ch. 772; *Punt* v. *Symons & Co.*, (1903) 2 Ch. 506; 72 L. J. Ch. 768.

(*d*) *Gray* v. *Lewis*, 8 Ch. 1035, 1050; 43 L. J. Ch. 281; *Menier* v. *Hooper's Telegraph Works*, 9 Ch. 350; 43 L. J. Ch. 330; *Alexander* v. *Automatic Co.*, (1900), 2 Ch. 56;

Instances of injunctions granted in such cases.

Directors accordingly have been restrained from issuing shares for the express purpose of thereby controlling a general meeting (*e*); or from issuing shares without the authority of a resolution of a general meeting of the company (*f*); or from exercising their powers so as to place themselves in a better position in regard to the payment of calls than the other shareholders (*g*), or from summoning the general meeting at such a date as to deprive shareholders of their power of voting (*h*); or from holding an irregular meeting not properly convened which was likely to be injurious to the interest of the company (*i*); or from using the corporate name and powers for the purpose of dividing amongst the majority, to the exclusion of the minority, consideration money received from an arrangement with another company (*k*).

So also where the votes of certain shareholders had been improperly rejected at a meeting of the company, an injunction was granted to restrain the company from acting on the footing of the votes being bad (*l*). So also if directors, acting under an erroneous construction of their articles, are intending to exclude from voting those who ought to vote, or if directors are intending to act on a resolution improperly come

69 L. J. Ch. 428; *Burland* v. *Earle*, (1902) A. C. 83, 93; 71 L. J. P. C. 1; *Punt* v. *Symons & Co.*, (1903) 2 Ch. p. 516; 72 L. J. Ch. p. 773; *Campbell* v. *Australian Mutual Provident Society* (1908), 77 L. J. P. C. 117; 99 L. T. 3; *Merrifield, Ziegler & Co.* v. *Liverpool Cotton Association*, (1911) 105 L. T. 104; *Dominion Cotton Mills Co.* v. *Amyot*, (1912) A. C. 546; 81 L. J. P. C. 233; *Ving* v. *Robertson* (1912), 56 S. J. 412; see also as to debenture-holders, *Goodfellow* v. *Nelson Line, Liverpool*, (1912) 2 Ch. 324, 333; 107 L. T. 344; *In re New York Taxicab Co.*, (1913) 1 Ch. p. 9; 82 L. J. Ch. p. 45.

(*e*) *Fraser* v. *Whalley*, 2 H. & M. 10; 11 L. T. 175; *Punt* v. *Symons & Co.*, (1903) 2 Ch. 506; 72 L. J. Ch. 768; see *Abbotsford Hotel Co.* v. *Kingham* (1910), 102 L. T. 118, where an interim injunction was refused.

(*f*) *Mosely* v. *Koffyfontein Mines Co.*, (1911) 1 Ch. 73; 80 L. J. Ch. 111; (1911) A. C. 409; 80 L. J. Ch. 668.

(*g*) *Alexander* v. *Automatic Telephone Co.*, (1900) 2 Ch. 56, 72; 68 L. J. Ch. 514.

(*h*) *Cannon* v. *Trask*, 20 Eq. 669; 44 L. J. Ch. 772.

(*i*) *Harben* v. *Philipps*, 23 C. D. p. 34; 48 L. T. 334.

(*k*) *Menier* v. *Hooper's Telegraph Works*, 9 Ch. 350; 43 L. J. Ch. 330.

(*l*) *Pender* v. *Lushington*, 6 C. D. 70; 46 L. J. Ch. 317.

to in a matter essential as regards the well-being of the company (*m*), or if directors, purporting to act on the authority of resolutions irregularly passed, threaten to part with the property of the company so as to cause irreparable injury (*n*), the Court will interfere. So also directors were restrained from issuing a circular which was of a misleading tendency and from proposing at a general meeting of the company certain resolutions, on the ground that the shareholders had not been fully informed and instructed upon what was proposed to be done (*o*). So also where the general management of a company's business is by its articles entrusted to the directors, the Court will restrain the company acting upon a resolution passed by a majority of the shareholders which is inconsistent with the articles and interferes with the directors in their management of the company's affairs (*p*).

Notice of extraordinary general meeting should specify purpose for which called.

The notice of an extraordinary general meeting must disclose all facts necessary to enable the shareholder receiving it to determine in his own interest whether or not he ought to attend the meeting, and the pecuniary interest of a director in the matter of a special resolution to be proposed at the meeting is for this purpose a material fact (*q*). Thus where an agreement entered into between two companies for the sale of the undertaking of the one to the other, and which provided for compensation being paid to the directors of the selling company for their loss of office, had been confirmed by a general meeting, but the notice calling the meeting described

(*m*) *Harben* v. *Phillipps*, 23 C. D. 33; 48 L. T. 334.

(*n*) *Normandy* v. *Ind, Coope & Co.*, (1903) 1 Ch. p. 108; 77 L. J. Ch. 82.

(*o*) *Jackson* v. *Munster Bank*, 13 L. R. Ir. 119.

(*p*) See *Automatic Self-Cleansing Filter Syndicate* v. *Cuninghame*, (1906) 2 Ch. 34; 75 L. J. Ch. 437; *In re Gramophone Typewriter Co.* v. *Stanley*, (1908) 2 K. B. p. 105; 77 L. J. K. B. p. 844; *Quin and Axten* v. *Salmon*, (1909) 1 Ch. 311, 319; 78 L. J. Ch. 506; (1909) A. C. 442; 78 L. J. Ch. 506; *Thomas Logan & Co.* v. *Davis*, (1911) 104 L. T. 914; 105 L. T. 419; *Blair Open Hearth Furnace Co.* v. *Reigart*, (1913) 108 L. T. 665. Cf. *Marshall's Valve Gear Co.* v. *Manning, Wardle & Co.*, (1909) 1 Ch. 267; 78 L. J. Ch. 46.

(*q*) *Kaye* v. *Croydon Tramways Co.*, (1898) 1 Ch. 358; 67 L. J. Ch. 222; *Tiessen* v. *Henderson*, (1899) 1 Ch. 861; 68 L. J. Ch. 353; *Normandy* v. *Ind, Coope & Co.*, (1908) 1 Ch. 84; 77 L. J. Ch. 82. See sects. 66—69, and Arts. 46—49, Table A, Companies (Consolidation)

the agreement merely as an agreement for the sale of the undertaking and did not mention the proposed payment to the directors, an injunction was granted restraining the company from carrying the agreement into effect until duly sanctioned by the shareholders at a meeting duly convened for the purpose (*r*). So also where the notice calling an extraordinary general meeting for the purpose of passing resolutions for the reconstruction of the company did not disclose that certain of the directors were largely interested in the proposed scheme, an injunction was granted restraining the company and its directors and ostensible liquidator from acting upon the resolutions (*s*).

Appointment of receiver where serious disputes among governing body.

The existence of disputes between the different members of the governing body of a company, which prevents its affairs being carried on properly, is a ground for the intervention of the Court by injunction and receiver to protect the property of the company, but the interference of the Court will be continued only until a governing body is duly appointed (*t*).

The company should *prima facie* sue for wrong to the company.

Where there is a body corporate capable of suing, that body only is the proper plaintiff in an action for the recovery of, or protection of, its property, and an action for that purpose cannot be maintained by one shareholder on behalf of himself and all others except the defendants (*u*). But this rule does not hold where the persons against whom the relief is sought control the majority of the company's shares, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names (*x*). This, however, is s

Act, 1908, and sect. 71, Companies Clauses Act, 1845.

(*r*) *Kaye* v. *Croydon Tramways Co.*, *supra*.

(*s*) *Tiessen* v. *Henderson*, *supra*.

(*t*) *Featherstone* v. *Cooke*, 16 Eq. 298; 21 W. R. 835; *Trade Auxiliary Co.* v. *Vickers*, 16 Eq. 303; 21 W. R. 836.

(*u*) *Gray* v. *Lewis*, 8 Ch. 1035; 43 L. J. Ch. 281; *Russell* v. *Wakefield Waterworks Co.*, 44 L. J. Ch. 498; *Russell* v. *Wakefield Waterworks Co.*, 20 Eq. 474; 44 L. J. Ch. 496; *Macdougall* v. *Gardiner*, 1 C. D. 13 23; 45 L. J. Ch. 27; *Burland* v *Earle*, (1902) A. C. p. 93; 71 L. J P. C. 1; *Marshall's Valve Gear Co.* v *Manning & Co.*, (1909) 1 Ch. p. 271 .78 L. J. Ch. 46; *Dominion Cotto Mills Co.* v. *Amyot*, (1912) A. C p. 552; 81 L. J. P. C. p. 235; *We End Hotels Syndicate* v. *Bay* (1913), 29 T. L. R. 92.

(*x*) *Burland* v. *Earle*, (1902) A. C p. 93; 71 L. J. P. C. 1.

mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have had if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character, or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company (*y*).

"There may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is a wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done" (*z*). In such a case, therefore, if individual shareholders bring an action using the name of the company, they do so at their own risk unless able to show that they have the support of the majority (*a*); and if the Court grant interlocutory relief, it will take care that a meeting be called at an early date to determine whether the action has in fact the approval of the majority of the shareholders (*b*).

(*y*) *Burland* v. *Earle*, (1902) A. C. p. 93; 71 L. J. P. C. 1.

(*z*) *Macdougall* v. *Gardiner*, 1 C. D. p. 22; 45 L. J. Ch. 27.

(*a*) *Macdougall* v. *Gardiner*, 1 C. D. 13, 22; 45 L. J. Ch. 27; *Pender* v. *Lushington*, 6 C. D. 70; 46 L. J. Ch. 317; *Imperial Hydropathic Hotel Co.* v. *Hampson*, 23 C. D. 1; 49 L. T. 147; *La Compagnie de Mayville* v. *Whitley*, (1896) 1 Ch. 788, 803; 65 L. J. Ch. 729; and see *Gold Reefs of Western Australia Co.* v. *Dawson*, (1897) 1 Ch. 115; 66 L. J. Ch. 147; *West End Hotels Syndicate* v. *Bayer*, (1913) 29 T. L. R. 92.

(*b*) *Pender* v. *Lushington*, 6 C. D. 70; 46 L. J. Ch. 317; *La Compagnie de Mayville* v. *Whitley*, (1896) 1 Ch. p. 803; 65 L. J. Ch. 729. See *Marshall's Valve Gear Co.* v. *Manning & Co.*, (1909) 1 Ch. p. 272; 78 L. J. Ch. 46.

Where an action is brought by a shareholder against the directors, who hold a preponderance of shares in the company, the proceeding may be in the form of an action by the plaintiff on behalf of himself and all other shareholders in the company (other than the defendants), the company being joined as co-defendants (*c*). "An action in this form is far preferable to an action in the name of the company, and then a fight as to the right to use its name" (*d*).

A company may not be registered, or carry on business, under a name calculated to deceive.

Sect. 8 of the Companies (Consolidation) Act, 1908, provides that a company may not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires. If a company, through inadvertence, or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, the first mentioned company may, with the sanction of the registrar, change its name.

Discretion of registrar.

The registrar has under the section a discretion, and if he refuses to register a company on the ground that its name so nearly resembles the name of a company already on the register, as to be calculated to deceive, the Court will not interfere by *mandamus*, unless it be satisfied either that the registrar did not in fact exercise any discretion, or that he exercised it upon some wrong principle of law, or that he was influenced by extraneous considerations which he ought not to have taken into account (*e*).

Injunction to restrain registration of

A "registered" company is entitled under the section (*f*)

(*c*) *Menier* v. *Hooper's Telegraph Works*, 9 Ch. 350; 43 L. J. Ch. 330; *Alexander* v. *Automatic Telephone Co.*, (1900) 2 Ch. 56, 69; 69 L. J. Ch. 428.

(*d*) *Alexander* v. *Automatic Telephone Co.*, (1900) 2 Ch. p. 69; 69 L. J. Ch. 428.

(*e*) *Rex* v. *Registrar of Companies*, (1912) 3 K. B. p. 34; 81 L. J. K. B. 914.

(*f*) See *Aerators, Ltd.* v. *Tollitt*, (1902) 2 Ch. p. 322; 71 L. J. Ch. p. 728; *Ouvah Ceylon Estates* v. *Uva Ceylon Rubber Estates*, (1910) 103 L. T. p. 417; 27 T. L. R

company, or the carrying on of business by registered company under name calculated to deceive.

to an injunction to restrain the "registration" of another company with a name identical with, or so closely resembling, the name of the registered company as to be calculated to deceive (*g*), and, if such a company has been registered, is at law entitled to an injunction to restrain it from carrying on a similar business under such a name (*h*). So also an "unregistered" company can at law restrain the registration of a company which is intended to carry on a similar business to that of the unregistered company, under a name so closely resembling it as to be calculated to deceive, and if such a company is registered, can restrain it from carrying on its business under such a name (*i*). In determining the question whether the name of a company is likely to deceive, the Court will apply the principles upon which injunctions are granted in the case of individuals carrying on the same business under similar names, and in ordinary cases of passing off (*k*).

p. 25, where it is pointed out that the law gives a larger protection to a company than it does to an individual, in respect of names which are identical.

(*g*) See *Tussaud* v. *Tussaud*, 44 C. D. 678; 59 L. J. Ch. 631; *Aerators, Ltd.* v. *Tollitt*, (1902) 2 Ch. 319; 71 L. J. Ch. 727; *Fine Cotton Spinners, &c., Co.* v. *Harwood, Cash & Co.*, (1907) 2 Ch. p. 190; 76 L. J. Ch. p. 672; *Kingston, Miller & Co.* v. *Thomas Kingston & Co.*, (1912) 1 Ch. p. 578; 81 L. J. Ch. p. 419.

(*h*) See *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank*, 9 C. D. 560; 47 L. J. Ch. 828; *Accident Insurance Co.* v. *Accident, Disease and General Insurance Co.*, 54 L. J. Ch. 104; *Manchester Brewery Co.* v. *North Cheshire and Manchester Brewery Co.*, (1898) 1 Ch. 539; 67 L. J. Ch. 351; (1899) A. C. 83; 68 L. J. Ch. 74; *Fine Cotton Spinners, &c., Co.* v. *Harwood, Cash & Co.*, (1907) 2 Ch. 184, 190; 76 L. J. Ch. p. 672; *Standard Bank of South Africa* v. *Standard Bank*, (1909) 25 T. L. R. 420; *Oswal Ceylon Estates* v. *Uva Ceylon Rubber Estates*, (1910) 103 L. T. 416; 27 T. L. R. 24; *Lloyds Bank* v. *Lloyds Investment Trust Co.*, (1912) 28 T. L. R. 379; *Kingston, Miller & Co.* v. *Thomas Kingston & Co.*, (1912) 1 Ch. 578; 81 L. J. Ch. p. 419.

(*i*) *Hoby* v. *Grosvenor Library Co.*, 28 W. R. 386; *Hendricks* v. *Montagu*, 17 C. D. 638; 50 L. J. Ch. 456; *Panhard et Levassor (Société Anonyme, &c.)* v. *Panhard et Levassor Motor Co.*, (1901) 2 Ch. 513; 70 L. J. Ch. 738; *Lloyds* v. *Lloyds (Southampton), Ltd.*, (1912) 28 T. L. R. 338.

(*k*) *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank*, 9 C. D. 560; 47 L. J. Ch. 828; *Aerators, Ltd.* v. *Tollitt*, (1902) 2 Ch. pp. 324, 325; 71 L. J

Fraud need not be proved.

To obtain an injunction, it is not necessary to prove fraud (*l*) on the part of the defendant company, it is sufficient to show that the similarity of names is calculated to deceive (*l*), and that there is a reasonable probability that the plaintiff's business will be damaged (*m*).

On application to register company with name similar to plaintiff Court considers business of the companies.

On an application to restrain the registration of a new company with a title alleged to be so similar to that of the plaintiff company as to be calculated to deceive, the Court will have regard to the kind of business which has been or is intended to be carried on by the plaintiff company, and to that which is intended to be carried on by the new company, and also to the kind of name which has been adopted by the plaintiff company (*n*).

Company cannot acquire monopoly of ordinary word.

Nor right to use name of individual to prejudice of others where goodwill not acquired.

A company cannot by registering as its title a word in common use acquire a monopoly of the word so as to restrain other companies making use of it (*o*). Nor can a company which has registered as its title the name of its promoter, without having acquired his business and goodwill, use such name to the prejudice of another person carrying on business under the same name; such a company does not merely by registration acquire and incorporate the individual rights which its

Ch. p. 729; *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.*, (1907) 2 Ch. pp. 320, 321; 76 L. J. Ch. p. 515.

(*l*) *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, (1899) A. C. 88; 68 L. J. Ch. 74; *Aerators, Ltd.* v. *Tollitt*, (1902) 2 Ch. p. 322; 71 L. J. Ch. p. 728; see *Scottish Union and National Insurance Co.* v. *Scottish National Insurance Co.*, (1909) S. C. 318; *Elliott* v. *Expansion of Trade, Ltd.*, (1910) 54 S. J. 101.

(*m*) *General Investment Co.* v. *General Reversionary Co.*, 1 Mog. 65; *The London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Assurance Co.*, 17 L. J. Ch. 37, where interlocutory injunctions were refused.

(*n*) *Aerators, Ltd.* v. *Tollitt*, (1902) 2 Ch. 319; 71 L. J. Ch. 727; and see *Scottish Union, etc., Insurance Co.* v. *Scottish National Insurance Co.*, note (*l*), *supra*.

(*o*) *Colonial Life Insurance Co.* v. *Home and Colonial Assurance Co.*, 33 Beav. 548; 33 L. J. Ch. 741; *Aerators, Ltd.* v. *Tollitt*, *supra*; *Electromobile Co.* v. *British Electromobile Co.* (1907), 97 L. T. 196; 23 T. L. R. 631; affirmed, (1908) 98 L. T. 258; 24 T. L. R. 192; *British Vacuum Cleaner Co.* v *New Vacuum Cleaner Co.*, (1907) 2 Ch. 312, 328; 76 L. J. Ch. 511; *H. E. Randall, Ltd.* v. *Bradley & Sons* (1907), 24 R. P. C. 773, 781; and see *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, (1907) A. C. 430; 76 L. J. P. C. 102.

promoter may have had to carry on business in his own name (*p*).

Right to injunction to protect trade name not lost by non-publication of name.

A company which has inadvertently omitted to publish its name in accordance with the provisions of sect. 63 of the Companies (Consolidation) Act, 1908, is not thereby precluded from obtaining an injunction to protect its trade name (*q*).

Company restrained from carrying on business of dentist struck off the register.

Where a company was formed to carry on the business of S., who had been struck off the dentists' register, the Court restrained the company from representing that it was carrying on the business of a dentist as successor to S., and from using any name or description implying that it was registered under the Dentists Act, 1878, or was specially qualified to practise dentistry (*r*).

Company restrained from falsely representing its officials as qualified veterinary surgeons.

So also where a company was formed to acquire the business of C., who was not a duly qualified veterinary surgeon within the meaning of the Veterinary Surgeons Act, 1881, the Court restrained the company and C., its managing director, from representing that C. was a duly qualified veterinary surgeon (*s*).

(*p*) *Fine Cotton Spinners, &c., Co.* v. *Harwood, Cash & Co.*, (1907) 2 Ch. 184, 190; 76 L. J. Ch. 670; *Kingston, Miller & Co.* v. *Thomas Kingston & Co.*, (1912) 1 Ch. 575, 582; 81 L. J. Ch. 417.

(*q*) *Randall, Ltd.* v. *British and American Shoe Co.*, (1902) 2 Ch. 354; 71 L. J. Ch. 683.

(*r*) *Att.-Gen.* v. *George C. Smith, Ltd.*, (1909) 2 Ch. 526; 78 L. J. Ch. 781; see also *Att.-Gen.* v. *Appleton* (1907), 1 Ir. 252; *Att.-Gen.* v. *Middletons*, (1907) 1 Ir. 471. As to the meaning of the words "specially qualified to practise dentistry" in sect. 3 of the Act of 1878, see *Bellerby* v. *Hepworth*, (1910) A. C. 377; 79 L. J. Ch. 402.

(*s*) *Att.-Gen.* v. *Churchill's Veterinary Sanatorium, Ltd.*, (1910) 2 Ch. 401; 79 L. J. Ch. 741.

CHAPTER XVIII.

INJUNCTIONS AGAINST CORPORATIONS.

Chap. XVIII.

Powers of statutory and common law corporations.

A CORPORATION created by or under a statute can do such acts only as are authorised expressly or impliedly by the statute by or under which it is incorporated (*a*); a corporation created by Royal Charter has the same power to contract and to deal with its property that an ordinary individual has (*b*); if it is restrained by its charter from doing certain things, and such things are done, proceedings may be instituted by *scire facias*, in the name of the Crown, to repeal the letters patent creating the corporation, but if the Crown takes no such steps, neither the corporation, nor the person who has contracted with it, can set up that the contract is void as being beyond the powers of the corporation (*c*). The application of the property of a common law corporation to other

(*a*) *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. pp. 262—264; 43 L. J. Ex. p. 205; *Wenlock* (*Baroness*) v. *River Dee Co.*, 36 C. D. p. 685, n.; ib., 10 A. C. p. 362; 54 L. J. Q. B. 577; *Att.-Gen.* v. *Manchester Corporation*, (1906) 1 Ch. p. 651; 75 L. J. Ch. p. 334; *Att.-Gen.* v. *Pontypridd Urban Council*, (1906) 2 Ch. p. 262; 75 L. J. Ch. 578; *Kingsbury Collieries Co. and Moore's Contract*, (1907) 2 Ch. p. 264; 76 L. J. Ch. p. 471.

(*b*) *Evan* v. *Corporation of Avon*, 29 Beav. 144, 149; 30 L. J. Ch. 165, 168; *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. pp. 263, 264; 43 L. J. Ex. p. 205; *Wenlock* (*Baroness*) v. *River Dee Co.*, 36 C. D. 685, n.; *Att.-Gen.* v. *Manchester Corporation*, *In re Kingsbury Collieries Co. and Moore's Contract*, *supra*; *Gray* v. *Provost of Trinity College, Dublin*, (1910) 1 Ir. p. 383; *British South Africa Co.* v. *De Beers Consolidated Mines Co.*, (1910) 1 Ch. 374—376; 79 L. J. Ch. 353, 354; S. C. reversed on appeal on other grounds, (1912) A. C. 52; 81 L. J. Ch. 137; *Scarborough Corporation* v. *Cooper*, (1910) 1 Ch. p. 71; 79 L. J. Ch. pp. 38, 40. As to Municipal Corporations, see the Municipal Corporation Act, 1882, ss. 108, 109, which impose restrictions on alienation.

(*c*) *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 9 Ex. 263, 264; 43 L. J. Ex. p. 205; *Wenlock* (*Baroness*) v. *River Dee Co.*, 36 C. D. p. 685, n. As to the alteration of a charter and the powers of a majority of the members of a corporation created by charter, see *Gray* v. *Provost of Trinity College, Dublin*, (1910) 1 Ir. 370.

than corporate purposes is therefore not in general a ground for the interference of the Court, unless a breach of trust can be shown (*d*). If corporate property be affected by a trust, the power and jurisdiction of the Court to enforce and execute the trust attaches equally as it does upon other property similarly circumstanced (*e*). The burden of proof lies on the party who seeks to establish the trust (*f*).

Jurisdiction of Court to interfere where property of common law corporation affected by a trust.

Thus where the members of a corporation had to take an oath against alienation generally, Lord St. Leonards held that a trust not to alienate must be inferred (*g*), but in a case where the oath which the members of a corporation had to take was against alienation so as to prejudice the corporation, the Court held that no trust was created, and that the corporation itself had the power of determining whether a sale was prejudicial or not, and allowed a demurrer to a bill for an injunction to restrain the corporation from selling part of its corporate property, there being no evidence of fraud on the part of the corporation (*h*).

The Court will interfere at the suit of a member of the corporation to prevent a forfeiture of the charter of the corporation (*i*), or to prevent the corporation from surrendering its charter with a view to obtaining a new charter for an object different from that for which the original charter was granted (*k*). So also the Court will interfere at the suit of a member of a friendly society to restrain its officers from converting it into a company under the Companies Act, 1908, with objects wider and differing from the objects specified in the rules of the society, or in sect. 8, sub-sect. 1, of the

Injunction to restrain forfeiture or improper surrender of charter.

Conversion of friendly society into company with wider objects.

(*d*) *Parr* v. *Att.-Gen.*, 8 Cl. & Fin. 409; *Att.-Gen.* v. *Portreeve of Avon*, 3 De G. J. & S. 637.

(*e*) *Evan* v. *Corporation of Avon*, 29 Beav. p. 149; *Att.-Gen.* v. *St. John's Hospital*, 2 De G. J. & S. 635; *In re Thompson's Settlement*, (1905) 1 Ch. p. 232; 74 L. J. Ch. 133.

(*f*) *Evan* v. *Corporation of Avon*, 29 Beav. 144.

(*g*) *Att.-Gen.* v. *Corporation of Cashel*, 3 Dr. & War. 294, 314; 61 R. R. 48.

(*h*) *Evan* v. *Corporation of Avon*, *supra*.

(*i*) *Rendall* v. *Crystal Palace Co.*, 4 K. & J. 326; 27 L. J. Ch. 397; *Gray* v. *Provost of Trinity College, Dublin*, (1910) 1 Ir. 384, 385.

(*k*) *Ward* v. *Society of Attorneys*, 1 Coll. 370, 379; 66 R. R. 101; see *Gray* v. *Provost of Trinity College, Dublin*, (1910) 1 Ir. p. 383.

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Friendly Societies Act, 1896 (*l*). But where a friendly society had been registered as a company with a memorandum of association containing objects more extensive than those comprised in sect. 8, sub-sect. 1, of the Act of 1896, the Court refused at the suit of a member of the company, who had been a member of the society, to restrain the company from exercising the powers contained in its memorandum of association which were in excess of the powers allowed under sect. 8 of the Act of 1896, and sect. 36 of the Assurance Companies Act of 1909 (*m*).

Parties.

If there be a trust and the trust be for public purposes, or the act complained of affects the property or revenues of the corporation, the suit should be instituted by the Attorney-General at the instance of a relator, who, if he has any interest in the matter, may join as plaintiff (*n*). If the Attorney-General declines to interfere, and the parties differ among themselves as to the proper mode of administering the trust, a certain number may file a bill on behalf of themselves and others, making some of the dissentients and the Attorney-General defendants (*o*). If the trust be of a private nature, or the act complained of does not affect the property or revenues of the corporation, the suit must be by action (*p*), and the Attorney-General should not be made a party (*q*). A corporation may itself institute the suit, although the trans-

(*l*) *Blythe* v. *Birtley*, (1910) 1 Ch. 228; 79 L. J. Ch. 315.

(*m*) *McMlade* v. *Royal London Mutual Insurance Society*, (1910) 2 Ch. 169; 79 L. J. Ch. 631; as to the relief which the plaintiff might have obtained, see the judgment of Buckley, L.J.

(*n*) *Att.-Gen.* v. *Mayor of Dublin*, 1 Bligh, N. S. 347; 30 R. R. 43; *Att.-Gen.* v. *Portreeve of Avon*, 3 De G. J. & S. 651; *Att.-Gen.* v. *Aspinall*, 2 M. & Cr. 613, 618; 7 L. J. (N. S.) Ch. 58; 45 R. R. 142; *Holden* v. *Bolton Corporation*, 3 T. L. R. 676; *Watson* v. *Mayor of Hythe*, (1906) 22 T. L. R. 245; *Att.-Gen.* v. *De Winton*, (1906) 2 Ch. 106, 115; 75 L. J. Ch. p. 615; see *Weir* v. *Fermanagh County Council and Enniskillen Urban District Council*, (1913) 1 Ir. pp. 198, 208.

(*o*) *Lang* v. *Purves*, 15 Moo. P. C. 389.

(*p*) *Att.-Gen.* v. *Newcombe*, 14 Ves. 1; *Davis* v. *Jenkins*, 3 V. & B. p. 157; 13 R. R. 168; see *Prestney* v. *Colchester Corporation and the Att.-Gen.*, 21 C. D. 111; 51 L. J. Ch. 805.

(*q*) *Att.-Gen.* v. *Portreeve of Avon*, 3 De G. J. & S. 637.

actions complained of may have been carried into effect in its name by the governing body (*r*).

Absolute discretion of Attorney-General as to suing.

The Courts have no jurisdiction to interfere with the discretion of the Attorney-General in consenting, or refusing to put the law in motion in matters affecting the public. "If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it is for the Attorney-General, and not for the Courts, to determine whether he ought to initiate litigation in that respect or not" (*s*).

Not entitled to injunction as of right.

The Attorney-General is not however entitled as of right to an injunction whenever a public body has exceeded its powers, for the Court has a discretion in the case of actions by the Attorney-General as well as in other actions (*t*).

Municipal Corporations Act, 1882.

Corporation within the Act, trustee of borough fund and property.

The funds and property of all corporations which are within the Municipal Corporations Act, 1882, are impressed with the character of a trust. The corporation has been constituted by the Act a trustee for public purposes of the borough fund and property, and is as such subject to the jurisdiction of the Court (*u*). Although the Act contains provisions for correcting abuses in respect of the borough property, there is nothing to exclude the ordinary jurisdiction of the Court to prevent a municipal corporation committing a breach of trust (*x*).

(*r*) *Att.-Gen.* v. *Wilson*, Cr. & Ph. 1; 10 L. J. (N. S.) Ch. 53; 47 R. R. 173

(*s*) *London County Council* v. *Att.-Gen.*, (1902) A. C. 168; 71 L. J. Ch. p. 269; *Att.-Gen.* v. *Wimbledon House Estate Co.*, (1904) 2 Ch. pp. 43, 44; 73 L. J. Ch. p. 596; *Att.-Gen.* v. *West Gloucester Water Co.*, (1909) 2 Ch. p. 346; 78 L. J. Ch. p. 751.

(*t*) *Att.-Gen.* v. *Wimbledon House Estate Co.*, (1904) 2 Ch. p. 42; 73 L. J. Ch. p. 596; *Att.-Gen.* v. *West Gloucester Water Co.*, *supra*; *Att.-Gen.* v. *Grand Junction Canal Co.*, (1909) 2 Ch. p. 518; 78 L. J. Ch. 681; *Att.-Gen.* v. *Birmingham Tame, &c., Drainage Board*, (1910) 1 Ch. p. 53; 79 L. J. Ch. p. 143; (1912) A. C. p. 812; 82 L. J. Ch. p. 56.

(*u*) See sects. 139, 140, and the Fifth Schedule to the Act.

(*x*) *Att.-Gen.* v. *Aspinall*, 2 M. & C. 613; 7 L. J. (N. S.) Ch. 51; 45 R. R. 142; *Att.-Gen.* v. *Wilson*, Cr. & Ph. p. 22; 10 L. J. Ch. 53; 47 R. R. 173; *Parr* v. *Att.-Gen.*, 8 Cl. & Fin. p. 431; *Att.-Gen.* v. *Batley Corporation*, 26 L. T. 392; *Att.-Gen.* v. *Corporation of Newcastle-upon-Tyne*, 23 Q. B. D. 492, 497; 58 L. J. Q. B. 558; aff. (1892) A. C. 568; 62 L. J. Q. B. 72; *Tynemouth Corporation* v. *Att.-Gen.*, (1899) A. C. pp. 305, 306; 68 L. J. Q. B. 752, 758; and see *Stevens* v.

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Thus a corporation was restrained from granting a lease at an undervalue and for a fine, contrary to the provisions of the 95th clause of the Municipal Corporations Act, 1835 (*y*).

Public bodies confined strictly within their powers.

Public bodies, incorporated by statute for a public purpose or the promotion of a public benefit, may not exceed the jurisdiction which has been entrusted to them by the legislature. If, under pretence of an authority which the law does give them to a certain extent, they exceed their authority, and assume to themselves a power which the law does not give them, the Court no longer considers them as acting under the authority of their commission, but treats them as persons acting without legal authority (*z*). So long as they strictly confine themselves within the limits of their jurisdiction, and proceed in the mode which the legislature has pointed out, the Court will not interfere with them in the exercise of their discretion in carrying out their powers, unless it be shown that they have not exercised their discretion *bonâ fide* (*a*).

Instances of acts *ultra vires*.

Accordingly, a municipal corporation, authorised to work tramways and carry parcels by them, was restrained from carrying on a general parcels delivery business apart from its tramway business (*b*). So also a local authority, which

Chown, (1901) 1 Ch. 894, 905; 70 L. J. Ch. p. 576; *Att.-Gen.* v. *Manchester Corporation*, (1906) 1 Ch. p. 651; 75 L. J. Ch. p. 334; *Att.-Gen.* v. *De Winton*, (1906) 2 Ch. 106, 116; 75 L. J. Ch. 612; *Att.-Gen.* v. *Fleetwood Urban District Council*, (1908) 72 J. P. 120.

(*y*) *Att.-Gen.* v. *Yarmouth Corporation*, 21 Beav. 625; 25 L. T. (O. S.) 5; 111 R. R. 231; see Municipal Corporations Act, 1882, ss. 5, 108, and 51 & 52 Vict. c. 41, s. 72, as amended by the Statute Law Revision Act, 1908.

(*z*) *Frewin* v. *Lewis*, 4 M. & C. p. 254; 48 R. R. 88. See *Tudder* v. *Wandsworth Board of Works*, 2 De G. & J. 261; 27 L. J. Ch. 342; 119 R. R. 121; *London County Council* v. *Att.-Gen.*, (1902) A. C. 165; 71 L. J. Ch. 268; *Att.-Gen.* v. *Manchester Corporation*, (1906) 1 Ch. p. 651; 75 L. J. Ch. p. 334; *Att.-Gen.* v. *Pontypridd Urban Council*, (1906) 2 Ch. p. 266; 75 L. J. Ch. 578; *Att.-Gen.* v. *West Gloucestershire Water Co.*, (1909) 2 Ch. pp. 340, 343; 78 L. J. Ch. 746; *Blythe* v. *Birtley*, (1910) 1 Ch. p. 235; 79 L. J. Ch. 315.

(*a*) Ib.; and see *Westminster Corporation* v. *London and North Western Railway Co.*, (1905) A. C. p. 430; 74 L. J. Ch. p. 636; *Rex* v. *Brighton Corporation*, (1907) 96 L. T. 762; 23 T. L. R. 441, 442.

(*b*) *Att.-Gen.* v. *Manchester Corporation*, (1906) 1 Ch. 643; 75 L. J. Ch. 330.

had acquired land under the compulsory powers conferred by the Public Health Act, 1875, for sewage purposes, was restrained from using the land for an isolation hospital (*c*). So also a municipal corporation, authorised to supply electricity, was restrained from supplying electrical fittings and apparatus for the use of the consumers of the electricity (*d*). So also a water company, incorporated for the purpose of erecting and maintaining defined works, and supplying water within certain limits, with power to purchase additional land for the purpose of its undertaking, was restrained from using the additional land which it had purchased at some distance from its works for a pumping station for a new water supply (*e*). So also water companies, incorporated for the purpose of supplying water within certain defined limits, were restrained from supplying it outside those limits although not expressly forbidden to do so by their Acts (*f*).

Misapplication of corporate funds.

Municipal corporations dealing with borough funds, and acting under a general or some local statute, and public bodies incorporated by statute for carrying into effect certain works, are bound to apply the corporate funds for the purposes directed, and in the mode pointed out, by the Act which gives them authority, and for no other purpose whatsoever (*g*). The

(*c*) *Att.-Gen.* v. *Hanwell Urban Council*, (1900) 2 Ch. 377; 69 L. J. Ch. 626. See now Public Health Act, 1907 (7 Edw. 7, c. 53), s. 95 (as to user of lands not required for purposes for which acquired); and *Stourcliffe Estates Co.* v. *Bournemouth Corporation*, (1910) 2 Ch. 12; 79 L. J Ch. 455; see also the Education (Administrative Provisions) Act, 1909 (9 Edw. 7, c. 29), s. 5.

(*d*) *Att.-Gen.* v. *Leicester Corporation*, (1910) 2 Ch. 359; 80 L. J. Ch. 21; *Att.-Gen.* v. *Sheffield Corporation* (1912), 106 L. T. 367; 28 T. L. R. 266.

(*e*) *Att.-Gen.* v. *Frimley and Farnborough District Water Co.*, (1908) 1 Ch. 727, 736; 77 L. J. Ch. 442. See *Marriott* v. *East Grinstead Gas and Water Co.*, (1909) 1 Ch. p. 77; *Att.-Gen.* v. *South Staffordshire Waterworks Co.* (1909), 25 T. L. R. 408.

(*f*) *Att.-Gen.* v. *West Gloucestershire Water Co.*, (1909) 2 Ch. 338; 78 L. J. Ch. 746. Cf. *Att.-Gen.* v. *Barnet Gas and Water Co.* (1910), 101 L. T. 65; aff. 102 L. T. 546 (H. L.). As to a water company delegating to another company its power to construct works and distribute water within the statutory area, see *Ticehurst Water and Gas Co.* v. *Gas and Waterworks Supply, &c., Co.* (1911), 55 S. J. 459.

(*g*) *Att.-Gen.* v. *Mayor of Wigan*, Kay, 268; 5 De G. M. & G. 54; 104 R. R. 22; *Att.-Gen.* v. *Mayor, &c.*,

application of the corporate funds to any other purpose than the proper purposes of the Act, however desirable it may be, is improper, and will be restrained by injunction (*h*). Thus a local authority was restrained from applying any part of the general district rate in repayment of a loan obtained without the sanction of the Local Government Board (*i*). So also the treasurer of a municipal corporation was restrained from applying any part of the borough fund in the repayment of a sum borrowed without authority, or in the payment of interest on such sum (*k*), notwithstanding that the payments might have been quashed by *certiorari* under sect. 141, subsect. 2, of the Municipal Corporations Act, 1882 (*l*). So also a municipal corporation, authorised to borrow for special undertakings, was restrained from borrowing by overdraft and applying the money for its general expenditure (*m*). So also a municipal corporation, authorised to contribute a sum out of the borough funds towards the purchase of a site for a

of Batley, 26 L. T. N. S. 392; W. N. (1872) 74; *Att.-Gen.* v. *Newcastle-upon-Tyne Corporation*, 23 Q. B. D. 492; *Leith Council* v. *Leith Harbour Commissioners*, (1899) A. C. 508; 68 L. J. P. C. 109; *Att.-Gen.* v. *Manchester Corporation*, (1906) 1 Ch. p. 651; 75 L. J. Ch. 330; *Att.-Gen.* v. *De Winton*, (1906) 2 Ch. 106, 116; 75 L. J. Ch. 612; see *Att.-Gen.* v. *West Ham Corporation*, (1910) 2 Ch. 560; 103 L. T. 394.

(*h*) *Att.-Gen.* v. *Swansea Corporation*, (1898) 1 Ch. 602; 67 L. J. Ch. 356 (opposition to bill in Parliament); *Att.-Gen.* v. *Camberwell Vestry*, 63 L. J. Ch. 878 (costs of inhabitants refusing to pay water company's charges); *Att.-Gen.* v. *Tynemouth Corporation*, (1899) A. C. 293; 68 L. J. Q. B. 752 (costs of chief constable); *Att.-Gen.* v. *London County Council*, (1901) 1 Ch. 781; 70 L. J. Ch. 267; (1902) A. C. 165, 169; 71 L. J. Ch. 268, 270; *Att.-Gen.* v. *Manchester Corporation*, (1906) 1 Ch. 651; 75 L. J. Ch. 330 (unauthorised business); *Att.-Gen.* v. *De Winton*, (1906) 2 Ch. 106; 75 L. J. Ch. 612 (interest on overdrafts); *Att.-Gen.* v. *Fleetwood Urban Council* (1908), 72 J. P. 120 (costs of another council); *Att.-Gen.* v. *Leicester Corporation*, (1910) 2 Ch. 360, 372; 89 L. J. Ch. 21; *Att.-Gen.* v. *Sheffield Corporation* (1912), 106 L. T. 367; 28 T. L. R. 266 (unauthorised business).

(*i*) *Att.-Gen.* v. *Tottenham Urban Council* (1909), 73 J. P. 437. See *Att.-Gen.* v. *West Ham Corporation*, (1910) 2 Ch. 560; 103 L. T. 394.

(*k*) *Att.-Gen.* v. *De Winton*, (1906) 2 Ch. 106, 118; 75 L. J. Ch. 612.

(*l*) *Att.-Gen.* v. *De Winton*, *supra*.

(*m*) *Att.-Gen.* v. *West Ham Corporation*, *supra*.

college, was held not entitled to pay interest on such sum (*n*). So also where a corporate body, without having authority so to do, has promoted a bill in Parliament for the purpose of obtaining increased powers, and such bill has been rejected, an injunction has been granted to restrain the corporation from discharging the expenses of the application to Parliament out of the corporate funds (*o*). So also commissioners under a local Act for draining and lighting a town, "with powers to pay all costs incident to the purposes of the Act and to carry the intents and purposes of the Act into full and complete execution in other respects," were restrained from applying any part of the rates raised under the Act in paying the expenses of an application to Parliament (*p*).

Expenses of promoting or opposing bills in Parliament.

The Borough Funds Acts, 1872 and 1903 (*q*), empower municipal bodies to apply the public funds or rates in promoting or opposing bills in Parliament, but subject nevertheless to the restrictions therein mentioned. It seems, however, that, independently of these Acts, a municipal corporation or public authority has the right to defray out of the borough funds or rates the expenses of resisting an attack made by bill in Parliament against the existence of the corporation, or against its property, or against its rights, powers, or privileges (*r*). On the same principle, the compensation authority of a county borough, under the Licensing (Consolidation) Act, 1910, was held entitled to pay out of the com-

Right of municipal corporation and other public authorities to defray out of borough funds their costs of resisting attacks on their rights, &c.

(*n*) *Att.-Gen.* v. *Cardiff Corporation*, (1894) 2 Ch. 337; 63 L. J. Ch. 557.

(*o*) *Att.-Gen.* v. *Norwich Corporation*, 16 Sim. 225; aff. 21 L. J. Ch. 139; *Att.-Gen.* v. *Guardians of Poor of Southampton*, 17 Sim. 6; 18 L. J. Ch. 393; *Att.-Gen.* v. *Plymouth Corporation*, 1 W. R. 445.

(*p*) *Att.-Gen.* v. *Andrews*, 2 Mac. & G. 225; 20 L. J. Ch. 467; *Att.-Gen.* v. *West Hortlepool, &c., Commissioners*, 10 Eq. 152; 39 L. J. Ch. 624. See as to form of order where members of a board have applied the produce of rates to an illegal purpose, *Att.-Gen.* v. *Tottenham Local Board*, (1872) W. N. 205; 27 L. T. (N. S.) 440.

(*q*) 35 & 36 Vict. c. 91, ss. 2, 4; 3 Edw. 7, c. 14, ss. 1, 3, 7.

(*r*) *Att.-Gen.* v. *Andrews*, 2 Mac. & G. 225; *Att.-Gen.* v. *Mayor of Wigan*, 5 De G. M. & G. 55; 23 L. J. Ch. 429; *Att.-Gen.* v. *Mayor, &c., of St. Helen's* (1870), W. N. 150; *Att.-Gen.* v. *Brecon Corporation*, 10 C. D. 204; 48 L. J. Ch. 153; *Att.-Gen.* v. *Thomson*, (1913) 3 K. B. p. 208; 29 T. L. R. 510; and see *Leith Council* v. *Leith Harbour and*

pensation fund their costs reasonably incurred in defending the validity of their decisions as such authority (*s*). In a case where a municipal corporation, without having first obtained the consent of the owners and ratepayers of the district, and otherwise complied with the requirements of sect. 4 (*t*) of the Borough Funds Act, 1872, opposed a bill in Parliament promoted by a local gas company, their opposition being directed against certain clauses in the bill affecting the price of gas to be paid by consumers, the corporation being large consumers of gas for public lighting and other purposes, it was held that the bill was not an attack upon the property, rights, duties or privileges of the corporation, within the principle of *Attorney-General* v. *Mayor of Brecon* (*u*), and an injunction was accordingly granted to restrain the corporation from applying any part of the borough fund (there being no surplus) in paying the expenses of opposing the bill (*x*). In like manner, a municipal corporation cannot, where there is no surplus, legally pay out of the borough funds the costs incurred by the chief constable in opposing, by direction of the council, appeals against the refusal of justices to renew the licenses of publicans; and it seems that even if there had been a surplus of the borough fund, the same could not have been so applied (*y*). So also a local authority was restrained from paying out of the rates the expenses of a dinner or a ball or other ceremonies in connection with the opening of a new vestry hall (*z*). So also a

Chief constable's costs of opposing appeals against refusals to renew licenses.

Expenses of ceremonies on opening of new vestry hall.

Docks Commissioners, (1899) A. C. p. 516; 68 L. J. P. C. p. 114.

(*s*) *Att.-Gen.* v. *Thomson*, (1913) 3 K. B. 198; 29 T. L. R. 510. See 10 Edw. 7 and 1 Geo. 5, c. 24, s. 21 (5).

(*t*) See now the Borough Funds Act, 1903 (3 Edw. 7, c. 14), s. 7, which enacts that the provision in sect. 4 of the Act of 1872, that no expenses in opposing a bill in Parliament shall be charged unless the opposition has had the consent of the owners and ratepayers of the district, shall cease to apply.

(*u*) 10 C. D. 204; 48 L. J. Ch. 153.

(*x*) *Att.-Gen.* v. *Mayor of Swansea*, (1898) 1 Ch. 602; 67 L. J. Ch. 356; and see *Att.-Gen.* v. *Rickmansworth Urban Council*, (1902) 86 L. T. 521; 18 T. L. R. 481.

(*y*) *Att.-Gen.* v. *Mayor of Tynemouth*, (1898) 1 Q. B. 604; (1899) A. C. 293; 68 L. J. Q. B. 752.

(*z*) *Att.-Gen.* v. *Bermondsey Vestry*, 23 C. D. 60; 52 L. J. Ch. 567. See also *Rex* v. *Dolby*, 87 L. T. 27; 18 T. L. R. 431, where

municipal corporation was restrained from purchasing out of the borough fund a chain and badge for the mayor (*a*). In a recent case (*b*) the Court refused to grant an interim injunction to restrain payment by a local authority out of the rates of a sum towards the Coronation festivities in its district, the Local Government Board having made a general order sanctioning a reasonable expenditure by local authorities for such purpose (*b*). A corporation will not be restrained from making a reasonable addition to its mayor's salary, if it is anticipated that during his year of office his expenditure as mayor may be increased by some event of national importance (*c*).

Expenses of Jubilee and Coronation festivities.

Mayor's salary.

Where a vestry authorised by Act of Parliament to levy rates for certain purposes had mixed the monies arising from distinct rates into one fund for the purpose of meeting the general expenditure of the parish, the Court restrained them from applying any portion of one class of rates and receipts in supplying the deficiencies in any other class of rates, and generally from applying the monies received by them for any other purposes than those for which they were authorised by the Act to be collected (*d*).

Injunction to restrain application of rates for unauthorised purposes.

Where a body of persons are by statute constituted trustees for certain public purposes, and powers are conferred on them to levy rates upon the district to a certain limited amount, they are authorised (if not expressly prohibited) to apply the rates of any one year in the payment of debts properly in-

Retrospective rate.

the West Ham District Council having purchased an omnibus for the purpose of conveying the members of the council about the district when performing their ordinary duties, expended certain moneys in repairing the omnibus, which the auditor disallowed. It was held that the surcharge by the auditor was right.

(*a*) *Att.-Gen.* v. *Batley*, 26 L. T. 302, a case on sect. 92 of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76).

(*b*) *Att.-Gen.* v. *East Barnet Valley Urban District Council*, (1911) 9 L. G. R. 913; 75 J. P. 484. In *Holden* v. *Bolton Corporation*, 3 T. L. R. 676, a motion to restrain payment out of the rates of Jubilee festivities was ordered to stand over, as the application should have been by the Attorney-General.

(*c*) *Att.-Gen.* v. *Blackburn Corporation*, 3 T. L. R. 676; *Att.-Gen.* v. *Cardiff Corporation*, (1894) 2 Ch. 337, 342; 63 L. J. Ch. 557.

(*d*) *Att.-Gen.* v. *Daniel*, 9 L. J. (N. S.) Ch. 381; and see *Att.-Gen.* v. *Corporation of Thetford*, 8 W. R. 467.

curred in a previous year in the execution of those trusts. It is otherwise, however, if the power of rating be unlimited in amount. Where one of the purposes of the trust is such that it can only be properly carried out by raising a sum of money larger than the current rates can supply, the trustees are justified in raising this sum by way of loan, and paying the same with interest out of the future rates (*e*).

Injunctions relating to poor law relief.

The Court has jurisdiction to grant an injunction restraining poor law guardians from applying rates in the relief of able-bodied men who, in consequence of a strike, refuse to accept work which they might obtain (*f*). But having regard to the wide powers vested in the Local Government Board of remitting, *i.e.*, authorising the allowance of expenses which have been properly disallowed in the audit of the poor law accounts, the Court ought to be "very careful in granting injunctions relating to poor law relief" (*g*).

Delay in applying to restrain *ultra vires* acts.

Delay in making the application to restrain a corporation from applying the corporate funds to other purposes than the proper purposes of the Act is not in most cases material (*h*).

Injunction to restrain local authority making a rate, and levying execution.

The Court has jurisdiction to restrain a local authority from making a rate (*i*), but the proper remedy is to apply by *certiorari* to the King's Bench Division under sect. 141, subsect. 2, of the Municipal Corporations Act of 1882 (*k*). The Court has also restrained a local authority from levying execution to enforce payment of a rate, on the plaintiff's under-

(*e*) *Att.-Gen.* v. *Church*, 2 H. & M. 697.

(*f*) *Att.-Gen.* v. *Merthyr Tydfil Union*, (1900) 1 Ch. 516; 69 L. J. Ch. 299.

(*g*) (1900) 1 Ch. p. 546; 69 L. J. Ch. p. 307; and see *Att.-Gen.* v. *East Barnet Valley Urban Council*, (1911) 9 L. G. R. 913; 75 J. P. 484.

(*h*) *Att.-Gen.* v. *Eastlake*, 11 Ha. 205, 228; and see *St. Mary, Islington Vestry* v. *Hornsey Urban Council*, (1900) 1 Ch. pp. 705, 706; 69 L. J. Ch. p. 330; *Att.-Gen.* v. *South Staffordshire Waterworks Co.*, (1909) 25 T. L. R. 408.

(*i*) *Att.-Gen.* v. *Lichfield Corporation*, 11 Beav. 121; 17 L. J. Ch. 472; *Newcastle-upon-Tyne Corporation* v. *Att.-Gen.*, (1892) A. C. 568; 62 L. J. Q. B. 72; see *Weir* v. *Fermanagh County Council and Enniskillen Rural District Council*, (1913) 1 I. R. 193—198.

(*k*) 45 & 46 Vict. c. 50; see *Tynemouth Corporation* v. *Att.-Gen.*, (1899) A. C. pp. 305, 306; 68 L. J. Q. B. p. 758; *Att.-Gen.* v. *De Winton*, (1906) 2 Ch. p. 118; 75 L. J. Ch. p. 616.

taking to consent to a case being stated for the opinion of the King's Bench Division and on payment into Court of the amount of the rate claimed (*l*).

Eleemosynary corporations. Eleemosynary corporations, or corporations for charitable purposes, are subject to the rules, laws, statutes, and ordinances ordained by the founder or the visitor whom he has appointed (*m*). To all eleemosynary corporations the right of visitation is incident. Where the King is founder, the King and his successors are the visitors: if a private person has been the founder, his heirs and assigns are the visitors. If the heirs of a founder fail, and no visitor has been appointed, the right of visitation devolves on the Crown, and is exercised on behalf of the Crown by the Court of Chancery (*n*). The visitor has an exclusive jurisdiction over all matters which come within the scope of his authority (*o*). Whatever relates to the internal management and regulation of the charity rests within the exclusive jurisdiction of the visitor. The decisions of the visitor, so long as he keeps within his jurisdiction, are final, and not examinable at law (*p*) or in equity (*q*). If the visitor has not acted, or has declined to act in a case where he ought to act, or is about to interfere in a case where he has no jurisdiction, application must be made to the King's Bench Division for a *mandamus* or a prohibition, as the case may be, and not to a Court of equity (*r*). The Court has no jurisdiction to interfere with the visitorial power, unless it

Visitors.

Court will not interfere with visitors unless committing breach of trust.

(*l*) *Ashworth* v. *Hebden Bridge Local Board*, 47 L. J. Ch. 195.

(*m*) *Philipps* v. *Bury*, 2 T. R. 346; 1 Lord Raym. 5.

(*n*) *Eden* v. *Foster*, 2 P. Wms. 326; *Att.-Gen.* v. *Gaunt*, 3 Sw. 148; 19 R. R. 186; *R.* v. *Catherine's Hall, Cambridge*, 4 T. R. p. 239; 2 R. R. 369; *In re Christ Church*, 1 Ch. 526; 14 L. T. 719; *Reg.* v. *Hertford College*, 3 Q. B. D. pp. 702, 703; 47 L. J. Q. B. p. 655.

(*o*) *Rex* v. *Bishop of Ely*, 2 T. R. 290; 1 R. R. 484; *Green* v. *Rutherforth*, 1 Ves. S. 462; *Att.-Gen.* v. *Magdalen College, Oxford*, 10 Beav. 492; 16 L. J. Ch. 391; 76 R. R. 148.

(*p*) *Philipps* v. *Bury*, 2 T. R. 346; *St. John's College* v. *Toddington*, 1 Burr. p. 200; *Reg.* v. *Hertford College*, 3 Q. B. D. pp. 702, 703; 47 L. J. Q. B. 649.

(*q*) *Att.-Gen.* v. *Smythies*, 2 M. & C. 135; 6 L. J. (N. S.) Ch. 35; 45 R. R. 24; *Att.-Gen.* v. *Dulwich College*, 4 Beav. 268; *Thompson* v. *University of London*, 33 L. J. Ch. 625; 10 L. T. 403.

(*r*) *Whiston* v. *Dean and Chapter of Rochester*, 7 Ha. 532; 18 L. J. Ch. 473; 82 R. R. 243.

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finds a breach of trust (*s*): but where there is a breach of trust the Court will interfere to see the trusts properly performed, notwithstanding there may be a general or a special visitor (*t*). Thus, where a French Protestant Church had been established by letters patent from the Crown, and the governing body had, apart from the charter of incorporation, funds impressed with a trust in favour of the pastor, who, when elected, was presented, approved, and instituted by the Crown, the Court, notwithstanding the visitorship of the Crown, restrained the governing body from hindering the pastor in the duties of his office (*u*). Where the duties of the visitor are not confined to overlooking the character of the institution, but extend to the management of the property, he is, so far as there is a trust, subject to the jurisdiction of the Court (*x*).

Eleemosynary corporations include hospitals, colleges, or free grammar schools incorporated for the teaching of children (*y*). Protestant dissenting chapels, incorporated by charter or letters patent for religious purposes, may be also classed under this head (*z*).

Spiritual or ecclesiastical corporations.

Visitors.

The visitor of a spiritual or ecclesiastical corporation has the same exclusive right over all matters which come within the scope of his authority as the visitor of an eleemosynary one (*a*). The Court of Chancery has no jurisdiction over the

(*s*) *Att.-Gen.* v. *Foundling Hospital*, 2 Ves. 41; *Re Berkhampstead School*, 2 V. & B. 134; 13 R. R. 43; *Thompson* v. *University of London*, 33 L. J. Ch. 625; *Att.-Gen.* v. *Magdalen College, Oxford*, 10 Beav. 402; 16 L. J. Ch. 391; 76 R. R. 148; *Att.-Gen.* v. *Governors of Dedham School*, 23 Beav. 350; 26 L. J. Ch. 497; 113 R. R. 169; *Reg.* v. *Hertford College, Oxford*, 3 Q. B. D. 702, 703; 47 L. J. Q. B. 649.

(*t*) *Att.-Gen.* v. *St. Cross Hospital*, 17 Beav. 435; 22 L. J. Ch. 793; 99 R. R. 228.

(*u*) *Daugars* v. *Rivaz*, 28 Beav. 233; 29 L. J. Ch. 685; 126 R. R. 109.

(*x*) *Att.-Gen.* v. *Lock*, 3 Atk. 165; *Att.-Gen.* v. *Smythies*, 2 M. & C. 135; 6 L. J. (N. S.) Ch. 35; 45 R. R. 24.

(*y*) *Att.-Gen.* v. *Price*, 3 Atk. 108; *Att.-Gen.* v. *Brasenose College*, 2 Cl. & Fin. 295; affirmed, 1 L. J. (N. S.) Ch. 66; 37 R. R. 107.

(*z*) *Att.-Gen.* v. *Cock*, 2 Ves. S. 273; *Att.-Gen.* v. *Fowler*, 15 Ves. 85; *Daugars* v. *Rivaz*, 28 Beav. 233; 29 L. J. Ch. 685; 126 R. R. 109.

(*a*) *Reg.* v. *Dean and Chapter of Chester*, 15 Q. B. 513; 19 L. J. Q. B. 485; 81 R. R. 949; *Reg.* v.

visitorial power unless it finds a trust (*b*); but where there is a trust the Court will interfere to see the trust properly performed, notwithstanding there may be a visitor (*c*). The relationship in the ordinary sense of trustee and *cestui que trust* does not exist between the dean and chapter of a cathedral and the head master of a grammar school attached to it, where both the cathedral and the school are governed by the statutes of the founder, and are subject to the jurisdiction of a special visitor, and where the head master is paid out of the common fund of the endowment. Where, accordingly, the Dean and Chapter of Rochester, in exercise of a power vested in them by the statutes of their founder, summarily dismissed the head master of the grammar school attached to the cathedral from his office without hearing him in his defence, the Court refused to interfere by injunction either *durante lite*, or otherwise, to restrain the dean and chapter from removing him from his office, or from appointing another head master in his stead (*d*).

Application of funds of charity.

Trustees of a charity, whether they be a corporation or individuals, having in their hands funds devoted to certain charitable purposes, must devote the funds of the charity to those purposes. The application of the funds to other than such purposes is a breach of trust, and will be restrained (*e*).

Action.

Where, however, an action (*f*) relating to a charity (*g*) involves, even if it be only in part, the administration of the trusts of the charity, the leave of the Charity Commissioners must be obtained under sect. 17 of the Charitable Trusts Act, 1853, to the institution of the proceedings (*h*).

Dean and Chapter of Rochester, 17 Q. B. 1, 29; 20 L. J. Q. B. 167; 85 R. R. 305.

(*b*) *Whiston* v. *Dean and Chapter of Rochester*, 7 Ha. 532; 18 L. J. Ch. 473; 82 R. R. 243.

(*c*) *Att.-Gen.* v. *St. Cross Hospital*, 17 Beav. 435; 22 L. J. Ch. 793; 99 R. R. 228; *Att.-Gen.* v. *Sherborne School*, 18 Beav. 256; 24 L. J. Ch. 274; 104 R. R. 443.

(*d*) *Whiston* v. *Dean and Chapter of Rochester*, 7 Ha. 532; 18 L. J. Ch. 473; 82 R. R. 243.

(*e*) *Att.-Gen.* v. *Compton*, 1 Y. & C. C. C. 417; *Att.-Gen.* v. *Corporation of Newbury*, C. P. Cooper, 72.

(*f*) Except proceedings by the Attorney-General, see sects. 17, 18 of the Act of 1853.

(*g*) Other than a charity within the exceptions in sect. 62 of the Act of 1853, see *Glenn* v. *Gregg*, 21 C. D. 513; 51 L. J. Ch. 783.

(*h*) See *Thomas* v. *Harford*, 48

Schemes of Charity Commissioners.

The Court will not interfere with the details of a scheme settled by the Charity Commissioners, unless they have exceeded their authority, or the scheme contains something wrong in principle or wrong in law (*i*).

Government departments.

Nor can the Court interfere with Government departments in the performance of their statutory duties, if they exercise the discretion entrusted to them by the legislature, *bonâ fide* and uninfluenced by extraneous or irrelevant considerations. But the Court has power to prevent the assumption by such bodies of a jurisdiction beyond that given to them by the law, and the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion, or deciding a point other than that brought before them (*k*).

Injunction to restrain presentation, and institution.

Pending a suit respecting the right of nomination to a benefice, a bishop will be restrained from taking advantage of the lapse and exercising the presentation (*l*). So also, where an improper appointment has been made of a chaplain or vicar by persons in whom the power of appointment is vested, the Court will restrain a bishop from instituting the person so appointed (*m*).

Interference with vicar in his benefice.

So also, the Court will, in a proper case, restrain a bishop and churchwardens from interfering with a vicar in the enjoyment of his benefice (*n*).

In a case where a vicar had for many years performed Divine service in a chapel on the defendants' estate, the Court refused to grant him an injunction restraining the defendants from excluding him from the chapel, it appearing that

L. T. 262; *Rendall* v. *Blair*, 45 C. D. 139; 59 L. J. Ch. 641; *Rookes* v. *Dawson*, (1895) 1 Ch. 486; 64 L. J. Ch. 301.

(*i*) *In re Campden Charities*, 18 C. D. 310, 331; 50 L. J. Ch. 646; *In re Berkhampstead School*, (1908) 2 Ch. p. 42; 77 L. J. Ch. p. 574; *In re Weir Hospital*, (1910) 2 Ch. 124; 79 L. J. Ch. 723.

(*k*) *Rex* v. *Board of Education*, (1910) 2 K. B. p. 179; 79 L. J. K. B. p. 603; *per* Farwell, L.J.: S. C. on appeal, (1911) A. C. 179; 80 L. J. K. B. 796.

(*l*) *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 98, 110; *Att.-Gen.* v. *Cuming*, 2 Y. & C. C. C. 139; 60 R. R. 86; *Nicholson* v. *Knapp*, 9 Sim. 326; 7 L. J. (N. S.) Ch. 219; 47 R. R. 255.

(*m*) *Att.-Gen.* v. *Earl of Powis*, Kay, 186; 101 R. R. 571; and see *Greenslade* v. *Dare*, 17 Beav. 502; 99 R. R. 261; *Potter* v. *Chapman*, Dick, 146.

(*n*) *Sweet* v. *Bishop of Ely*, (1902) 2 Ch. 508, 516; 71 L. J. Ch. 771.

the chapel was not a consecrated public building, but had always been merely a domestic chapel, so that the plaintiff had not as vicar of the parish any right to t[illegible] session or control of the chapel, except with the conse[illegible] the defendants (*o*).

(*o*) *Nevill* v. *Studdy*, (1906) 94 L. T. 391; 22 T. L. R. 349.

CHAPTER XIX.

INJUNCTIONS AGAINST CLUBS, SOCIETIES, ETC.

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WHERE parties contribute funds which are laid out on property which all enjoy in common, such as clubs, societies, associations, &c., the members of which have agreed to bind themselves by certain rules, they are bound by their rules, and the Court will not interfere, except in cases of breach of trust or oppression (*a*). The jurisdiction of the Court in such cases is founded on the common interest of every member in the property of the club, society, &c., and on the common right of every member to require that the rules to which he has subscribed shall be properly carried out (*b*).

But although in the case of an ordinarily constituted club, in which members have rights of property, a member whose rights have been interfered with by the committee is entitled to ask the Court to consider whether the rules of the club have been observed, whether anything has been done which is contrary to natural justice, and whether the decision complained of has been come to *bonâ fide* (*c*), in the case of a proprietary club in which members have no rights of property, but merely the right to use the club on certain conditions, a member whose rights have been improperly interfered with cannot obtain relief by way of injunction, but only in damages (*d*).

(*a*) See *Hopkinson* v. *Marquis of Exeter*, 5 Eq. 63, 68; 37 L. J. Ch. 173; *Larrington* v. *Sendall*, (1903) 1 Ch. 921; 72 L. J. Ch. 396; *Thellusson* v. *Viscount Valentia*, (1906) 1 Ch. 480; 75 L. J. Ch. 368; (1907) 2 Ch. 1; 76 L. J. Ch. 465; *Lapointe* v. *L'Association de Bienfaisance, etc., de la Police de Montréal*, (1906) A. C. 535; 75 L. J. P. C. 73.

(*b*) See *Millican* v. *Sullivan*, 4 T. L. R. p. 204; *Harington* v. *Sendall*, (1903) 1 Ch. p. 926; 72 L. J. Ch. 396.

(*c*) *Baird* v. *Wells*, 44 C. D. 661, 670; 59 L. J. Ch. 673; *Gray* v. *Allison*, (1909) 25 T. L. R. 531.

(*d*) *Baird* v. *Wells*, *supra*; and see *Lyttelton* v. *Blackburne*, 45 L. J. Ch. 219.

Expulsion from a club.

The Court has jurisdiction to restrain the committee or a general meeting of a club (not being a proprietary club) from expelling a member of the club, but in exercising the jurisdiction the Court does not sit as a Court of Appeal from the decision of the members of the club duly assembled. All that the Court requires is that their proceedings be conducted on the common principles of ordinary justice. The Court will not interfere against the decision of the members of a club expelling a member of the club unless it can be shown either that what has been done is not authorised by any rule of the club or is not regular, or that, if it be within any rule of the club, the rule is not consonant with the principles of natural justice, or that there has been *mala fides* or malice in arriving at the decision (*e*). The Court has first to consider whether the action of the committee or of the general meeting was authorised by any rule, that is to say, whether it was within the terms of any rule and whether it was regular (*f*). The rules of the club as to the formalities necessary for the expulsion of a member by the committee or by a general meeting must be strictly complied with. A general meeting, if required by the rules, must be summoned with proper notice, and the resolution must be carried by a sufficient majority. If the meeting has been irregularly called or the resolution has been carried by an insufficient majority, the Court will at the instance of the member so proceeded against restrain the club by injunction from interfering with his rights of membership (*g*).

The proceedings must be regular.

The next thing for the Court to consider is whether the committee or general meeting of a club, in convicting a member of an offence warranting his expulsion from the club, have acted on the principles of natural justice. Though what is done may be within the rules of the club, it may be con-

(*e*) *Baird* v. *Wells*, 44 C. D. 661; 59 L. J. Ch. 673; *Harington* v. *Sendall*, (1903) 1 Ch. 921; 72 L. J. Ch. 396; *Gray* v. *Allison*, (1909) 25 T. L. R. 531.

(*f*) *Dawkins* v. *Antrobus*, 17 C. D. 615; 44 L. T. 557; *Harington* v. *Sendall*, *supra*; *Andrews* v. *Mitchell*, (1905) A. C. 78; 74 L. J. Q. B. 78 (friendly society); *D'Arcy* v. *Adamson*, (1913) 29 T. L. R. 367; 57 S. J. 391.

(*g*) *Labouchere* v. *Lord Wharncliffe*, 13 C. D. 346; 41 L. T. 638.

The member must have opportunity of being heard.

trary to natural justice. It would be a denial of natural justice, if a decision was come to expelling a man without giving him an opportunity of stating his case and defending his conduct. Where the conduct of one of its members is impugned, due notice (*h*) ought to be given to that member of what the committee are going to consider as a ground for his expulsion, in order that he may have an opportunity of stating his case and defending his conduct. The Court will at the instance of any member of a club declare any resolution passed without previous notice to him based upon *ex parte* evidence purporting to expel him from the club to be null and void, and will restrain the club by injunction from interfering by virtue of such resolution with his rights of membership (*i*).

The power of expulsion must be exercised *bonâ fide*.

If the proceedings of the committee or members of a club in expelling a member have been in strict accordance with the rules and the rules are not in any way contrary to natural justice, the next consideration for the Court is whether the proceedings have been in the *bonâ fide* honest exercise of the powers given by the rules. If the committee, acting *bonâ fide* and without malice, come to the conclusion that a man is not a fit member of the club, or that his conduct is injurious to the interests of the club, the Court will not interfere. It is not for the Court to consider whether it should have arrived at the same conclusion or not. The Court has no right to consider whether what was done was right or not, or even as a substantive question whether what was decided was reasonable or not. The only question is whether it was *bonâ fide*. The

(*h*) See *James* v. *Institute of Chartered Accountants*, (1907) 98 L. T. 225; 24 T. L. R. 27, in which case the Court held that notice had been duly given where it had been posted to the plaintiff's registered address in the list of members, though the plaintiff did not receive it, owing to his omission to notify his change of address.

(*i*) *Fisher* v. *Keane*, 11 C. D. 353; 49 L. J. Ch. 11; *Lambert* v. *Addison*, 46 L. T. N. S. 20; *Andrews* v. *Mitchell*, (1905) A. C. 78; 74 L. J. Q. B. 333 (friendly society); *Gray* v. *Allison*, (1909) 25 T. L. R. 531; *D'Arcy* v. *Adamson*, (1913) 29 T. L. R. 367; 57 S. J. 391; and see *Luby* v. *Warwickshire Miners' Association*, (1912) 2 Ch. p. 379; 81 L. J. Ch. p. 744; *Parr* v. *Lancashire and Cheshire Miners' Federation*, (1913) 1 Ch. p. 373; 82 L. J. Ch. 196.

question whether the decision was erroneous or not can only be taken into consideration in determining whether that decision is so absurd or evidently wrong as to afford evidence that the action was not *bonâ fide*, but was malicious or capricious or proceeding from something other than a fair and honest exercise of the powers given by the rule (*k*). The fact that a decision is unreasonable may be strong evidence of malice, but is not conclusive and may be rebutted by evidence of *bona fides* (*l*).

In a case where one of the rules of a club provided that in case the conduct of any member should in the opinion of the committee be injurious to the character and interests of the club, the committee should be empowered to recommend such member to resign, and if he should not comply, the committee should then call a general meeting which should by a certain majority have power to expel him; and the plaintiff, a member of the club, sent a pamphlet reflecting on the conduct of S., a gentleman in high official position, also a member of the club, to S. at his official address enclosed in an envelope, on the outside of which was printed, "Dishonourable conduct of S.," the committee being of opinion that this action was injurious to the character and interests of the club, called upon the plaintiff for an explanation of his conduct, which he refused to give. They then called on him to resign, and as he did not comply with their recommendation, they duly summoned a general meeting, at which a resolution was passed by the requisite majority expelling the plaintiff from the club. The Court would not interfere to restrain his expulsion from the club (*m*).

Committees in cases of the kind are not expected to act on strictly legal evidence. A committee in arriving at a conclusion may be drawn to it by one of a great many cir-

(*k*) *Richardson-Gardner* v. *Freemantle*, 24 L. T. 81; *Hopkins* v. *Marquis of Exeter*, L. R. 5 Eq. 63; 37 L. J. Ch. 173; *Labouchere* v. *Lord Wharncliffe*, 13 C. D. p. 352; 41 L. T. 638; *Dawkins* v. *Antrobus*, 17 C. D. 615; 44 L. T. 557; *Lambert* v. *Addison*, 46 L. T. 20; *Lyttelton* v. *Blackburne*, 45 L. J. Ch. 219.

(*l*) *Dawkins* v. *Antrobus*, *supra*.

(*m*) *Dawkins* v. *Antrobus*, *supra*.

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cumstances which are well known in the club and quite true in fact and detail, though not at the moment proved before them. They may consider the immediate conduct a culminating act, although they may not have so expressed it (*n*).

Alteration of rules.

In a case where one of the rules of a club provided that a general meeting might alter any of the standing rules affecting the general interests of the club, provided this was done with certain formalities and by a certain majority, it was held that a rule providing for the expulsion of members who should be guilty of conduct injurious to the interests of the club could be validly passed by a general meeting, provided all the requisite formalities were complied with (*o*). So also where the rules of a club formed for the purpose of providing a ground for pigeon shooting and other sports, contained power to alter any of the rules by a resolution of a prescribed majority of members, and a resolution was duly passed that pigeon shooting should be discontinued at the club, the Court refused to declare the resolution invalid, or to restrain the trustees of the club from acting on it, holding that there was no fundamental rule that any particular sport should be provided at the club (*p*).

Where the rules of a club at the date when a person becomes a member contain no provision for altering the same from time to time, the annual subscription to the club cannot be raised so as to bind such member to pay it. Accordingly, an injunction was granted restraining the committee of a club from excluding the plaintiff (who had refused to pay an increased subscription), and from preventing him from exercising his rights as a member (*q*).

Trade Unions.

By the Trade Union Act, 1871 (*r*), it is provided that the purposes of a trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void

(*n*) *Dawkins* v. *Antrobus*, 17 C. D. p. 623; 41 L. T. p. 493, *per* Jessel, M.R.

(*o*) *Dawkins* v. *Antrobus*, 17 C. D. 615; 44 L. T. 557.

(*p*) *Thellusson* v. *Viscount Valentia*, (1906) 1 Ch. 480; 75 L. J. Ch. 368; (1907) 2 Ch. 1; 76 L. J. Ch. 465.

(*q*) *Harington* v. *Sendall*, (1903) 1 Ch. 921; 72 L. J. Ch. 396.

(*r*) 34 & 35 Vict. c. 31.

or voidable any agreement or trust (*s*), but the Court shall not entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the agreements specified in sect. 4 of the Act (*t*).

Injunction to restrain expulsion from union when granted.

The Court has jurisdiction to grant an injunction restraining a trade union and its officials from wrongfully expelling a member, as an action claiming such relief is not a proceeding to "directly enforce an agreement" within the meaning of sect. 4 of the Act (*u*). But where a member of a trade union who had been expelled for a breach of the rules of the society claimed a declaration that he was entitled to participate in the benefits of the society, and an injunction restraining its committee and trustees from excluding him from such participation, the Court dismissed the action on the ground that it was brought to "directly enforce an agreement between members of a trade union to provide benefits to members" within the meaning of sect. 4, sub-sect. 3 of the Act (*x*). So also where the committee of an association of tea warehouse keepers, passed a resolution expelling the plaintiffs for an alleged breach of the rules regulating the rates to be charged by members of the association on teas, the Court refused to interfere, holding that the action was brought to enforce an agreement between members within the meaning of sect. 4, sub-sect. 1 of the Act (*y*). So also where the executive committee of a trade union passed a resolution imposing fines on some of the members for having worked with a non-member of the union, the Court refused to declare the resolution *ultra vires* or to restrain the defendants from levy-

(*s*) Sect. 3.

(*t*) Sect. 4.

(*u*) *Osborne* v. *Amalgamated Society of Railway Servants*, (1911) 1 Ch. 540; 80 L. J. Ch. 315; *Luby* v. *Warwickshire Miners' Association*, (1912) 2 Ch. 371; 81 L. J. Ch. 741; *Parr* v. *Lancashire and Cheshire Miners' Federation*, (1913) 1 Ch. 335; 82 L. J. Ch. 193.

(*x*) *Rigby* v. *Connoll*, 14 C. D. 482; 49 L. J. Ch. 328. The action was also dismissed on the ground that the society was an illegal association. See *Osborne* v. *Amalgamated Society of Railway Servants*, *supra*.

(*y*) *Chamberlain's Wharf, Ltd.* v. *Smith*, (1900) 2 Ch. 605; 69 L. J. Ch. 783. See *Osborne* v. *Amalgamated Society of Railway Servants*, *supra*.

ing the fines on the ground that the action was one to directly enforce an agreement within sect. 4, sub-sect. 2 of the Act (*z*).

Injunctions to restrain misapplication of funds.

The Court will, on the application of any member of a trade union, restrain the officials and agents of the union from misapplying the funds of the society. In granting an injunction to preserve the fund, the Court does not "directly enforce an agreement" within the meaning of sect. 4 of the Act (*a*). Injunctions have accordingly been granted to restrain the funds of a trade union being applied in carrying out an amalgamation with another society (*b*), or in paying strike money in cases not authorised by the rules (*c*). So also an injunction has been granted at the instance of a trade union to restrain the trustees and secretary of a branch of the union from distributing the funds under their control amongst the members of the branch society on its secession from the plaintiff society. But the Court refused to order the defendants to pay the funds to the plaintiffs, holding that such an order would be "directly enforcing an agreement for the application of funds to provide benefits to members" within sect. 4 of the Act (*d*). So also injunctions have been granted to restrain trade unions from levying contributions from their members for the purpose of securing Parliamentary (*e*) or municipal (*f*) representation.

Parliamentary levies.

Trade Union Act, 1913.

The Trade Union Act, 1913 (*g*), now provides that the

(*z*) *Mullett* v. *United French Polishers' (London) Society*, (1904) 91 L. T. 133; 20 T. L. R. 595.

(*a*) *Wolfe* v. *Matthews*, 21 C. D. 194; 51 L. J. Ch. 823; *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*, (1901) A. C. p. 428, *per* Farwell, J.; *Yorkshire Miners' Association* v. *Howden*, (1905) A. C. 256; 74 L. J. K. B. 511; and see *Oram* v. *Hutt*, (1913) 1 Ch. 259; 82 L. J. Ch. 152; affirmed W. N. 315 (maintenance of suit).

(*b*) *Wolfe* v. *Matthews*, *supra*.

(*c*) *Yorkshire Miners' Association* v. *Howden*, *supra*.

(*d*) *Cope* v. *Cressingham*, (1909) 2 Ch. 148; 78 L. J. Ch. 615.

(*e*) *Amalgamated Society of Railway Servants* v. *Osborne* (1910) A. C. 87; 79 L. J. Ch. 87; *Farr* v. *Lancashire and Cheshire Miners' Federation*, (1913) 1 Ch. 366; 82 L. J. Ch. 193 (registered unions); *Wilson* v. *Scottish Typographical Association*, (1913) S. C. 534 (unregistered union).

(*f*) *Wilson* v. *Amalgamated Society of Engineers*, (1911) 2 Ch. 324; 80 L. J. Ch. 469.

(*g*) 2 & 3 Geo. 5, c. 30, s. 3, sub-s. 1.

funds of a trade union (*h*), shall not be applied for the political objects specified in the Act (*i*), unless (a) the furtherance of such objects has been approved as an object of the union, by a resolution (*k*) passed on a ballot (*l*) of the members of the union by a majority of the members voting; and (b), where such a resolution is in force, unless rules approved by the Registrar of Friendly Societies are in force providing:—

(1) That any payments for such political objects are to be made out of a separate fund, and for the exemption (*m*) of any member of the union from any obligation to contribute to such fund if he gives notice in accordance with the Act (*n*) that he objects to contribute; and

(2) That a member who is exempt from the obligation to contribute to the political fund of the union shall not be excluded from any benefits of the union, or placed in any respect under any disability or at any disadvantage (except in relation to the control of the political fund), by reason of his being so exempt, and that contribution to the political fund of the union shall not be made a condition for admission to the union.

Remedy.

The remedy of a member of a trade union who is aggrieved by a breach of any of the rules made under sect. 3 of the Act is to complain to the Registrar of Friendly Societies, who may make such order for remedying the breach as he thinks just under the circumstances, after having heard the applicant and any representative of the union (*o*).

The order of the Registrar is binding on all parties without appeal, and cannot be removed into any Court of law or be restrained by injunction, and when it has been recorded in the County Court (*p*), may be enforced as if it was an order of the County Court (*q*).

(*h*) As to "trade union," see sect. 2, sub-s. 1.

(*i*) See sect. 3, sub-s. 3.

(*k*) The resolution takes effect as a rule of the union, and may be rescinded as such. Sect. 3, sub-s. 4.

(*l*) See sect. 4.

(*m*) See sect. 6.

(*n*) See sect. 5 and schedule.

(*o*) Sect. 3, sub-s. 2.

(*p*) Sheriff's Court in Scotland, s. 3, sub-s. 2.

(*q*) Sect. 3, sub-s. 2.

CHAPTER XX.

ORDERS RESTRAINING PROCEEDINGS.

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Judicature Act, 1873, s. 24, sub-s. 5.

UNDER the former procedure the Court of Chancery had jurisdiction to restrain by injunction an action at law in all cases where the defendant to the action could show that he had a good equitable defence. But this jurisdiction has been abolished by the Judicature Act, 1873, by which it is enacted that no cause or proceeding pending in the High Court of Justice, or in the Court of Appeal, shall be restrained by injunction or prohibition, but that every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained under the former procedure may be relied on by way of defence thereto: Provided that nothing in the Act shall disable either the High Court or the Court of Appeal from directing a stay of proceedings in any cause or matter pending before it, if it shall think fit, upon application made to it in a summary way (*a*).

The proviso does not confer jurisdiction upon any Court which did not have it before the passing of the Act, but simply keeps alive the jurisdiction which existed prior to the Act (*b*). The enactment only applies where a proceeding is "pending," accordingly there is jurisdiction to restrain by injunction the institution of proceedings in the High Court (*c*).

Frivolous and vexatious actions.

Order 25, r. 4, provides that any pleading may be struck out on the ground that it discloses no reasonable cause of action or answer; and in such case, or in case of the action

(*a*) 36 & 37 Vict. c. 66, s. 24, sub-s. 5; *Garbutt* v. *Faucus*, 1 C. D. 155; 45 L. J. Ch. 133; *Wright* v. *Redgrave*, 11 C. D. 24; 40 L. T. 206.

(*b*) *The James Westoll*, (1905) P. p. 51; 74 L. J. P. 9.

(*c*) *Besant* v. *Wood*, 12 C. D. p. 630; *Hart* v. *Hart*, 18 C. D. p. 680; 50 L. J. Ch. p. 698; and see *In re Maidstone Palace of Varieties*, (1909) 2 Ch. 283, 286; 78 L. J. Ch. 739.

or defence being shown by the pleadings to be frivolous or vexatious, the action may be stayed or dismissed, or judgment entered, as may be just. Independently of this rule, every Court of justice has an inherent jurisdiction to protect itself from abuse of its own procedure, and to stay proceedings which are manifestly frivolous and vexatious (*d*). When an application is made under Order 25, r. 4, the Court does not look outside the pleadings (*e*), but when the application is under the inherent jurisdiction of the Court, affidavit evidence is admissible (*f*).

Jurisdiction to restrain proceedings exercised with care.

The jurisdiction of the Court to stay proceedings on the ground that they are an abuse of the process of the Court, will be exercised with great caution (*g*).

The fact that an action has been commenced in England, which might more conveniently and with less expense to the defendant, be tried out of the jurisdiction, is not of itself a sufficient reason for staying the action as vexatious. In order to justify a stay, it must be proved that either the expense or the difficulties of trial in England would be so great that injustice would be done, or that the action was brought in England for the purpose of annoyance and oppression (*h*).

Vexatious Actions Act, 1896.

By the Vexatious Actions Act, 1896, it is provided that the

(*d*) *Metropolitan Bank* v. *Pooley*, 10 A. C. 210, 214; 54 L. J. Q. B. 449; *Reichel* v. *Magrath*, 14 A. C. 665; 59 L. J. Q. B. 159; *In re A Company*, (1894) 2 Ch. 350; 63 L. J. Ch. 565; *Stephenson* v. *Garnett*, (1898) 1 Q. B. 677; 67 L. J. Q. B. 447; *Salaman* v. *Secretary of State for India*, (1906) 1 K. B. p. 630; 75 L. J. K. B. p. 429; *Norton* v. *Norton*, (1908) 1 Ch. 471; 77 L. J. Ch. 312. As to Order XXV. r. 4, see *Dyson* v. *Att.-Gen.*, (1911) 1 K. B. 410; 80 L. J. K. B. 531. As to form of order restraining frivolous interlocutory proceedings, see *Kinnaird* v. *Field*, (1905) 2 Ch. 306; 71 L. J. Ch. 554.

(*e*) *Republic of Peru* v. *Peruvian Guano Co.*, 36 C. D. 489; 56 L. J. Ch. 1081; *Att.-Gen. of Duchy of Lancaster* v. *London and North Western Railway Co.*, (1892) 3 Ch. p. 278; 62 L. J. Ch. p. 273.

(*f*) *Remmington* v. *Scoles*, (1897) 2 Ch. 1; 66 L. J. Ch. 526; and see *Lawrence* v. *Lord Norreys*, 39 C. D. 213; 15 A. C. 210; 59 L. J. Ch. 681; *Critchell* v. *London and South Western Railway Co.*, (1907) 1 K. B. 860; 76 L. J. K. B. 422.

(*g*) *Logan* v. *Bank of Scotland*, (1906) 1 K. B. p. 150; 75 L. J. K. B. p. 223; *Norton* v. *Norton*, (1908) 1 Ch. p. 479; 77 L. J. Ch. p. 315; *Shackleton* v. *Swift*, (1913) 2 K. B. p. 312; 82 L. J. K. B. p. 613.

(*h*) *Egbert* v. *Short*, (1907) 2 Ch. 205; 76 L. J. Ch. 520; *Norton* v. *Norton*, (1908) 1 Ch. 471; 77 L. J. Ch. 312.

Attorney-General may apply for an order under the Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings, whether in the High Court or in any inferior Court, and whether against the same person or against different persons, the Court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person in the High Court or any other Court, unless he obtains leave of the High Court or some Judge thereof, and satisfies the Court or Judge that there is *primâ facie* ground for such proceeding (*i*).

Injunctions to stay proceedings in inferior Courts.

The High Court has jurisdiction on a proper case being made out to restrain proceedings in the County Courts (*k*), the Lord Mayor's Court (*l*), the Court of Passage (*m*), the Palatine Court (*n*), in tribunals constituted for a special purpose (*o*), and proceedings before magistrates (*p*).

Injunction to stay action brought within jurisdiction on cause of action arising out of the jurisdiction.

The High Court has also jurisdiction to stay an action brought within the jurisdiction in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff, and that the inconvenience of defending the action in England will be so great as to amount to oppression to which the defendant would

(*i*) 59 & 60 Vict. c. 51. See *In re Jonas* (1902), 18 T. L. R. 476. The Act does not apply to criminal proceedings. *In re Boaler*, (1914) 1 K. B. 122 (Darling and Lush J.J., Bankes J., diss).

(*k*) *Ratcliffe* v. *Winch*, 16 Beav. 576; 96 R. R. 267; *Reg.* v. *Judge of Lincolnshire County Court*, 20 Q. B. D. 167; 57 L. J. Q. B. 136; *Channel Coaling Co.* v. *Ross*, (1907) 1 K. B. 145; 76 L. J. K. B. 145.

(*l*) *Sieveking* v. *Behrens*, 2 M. & C. 581; *Cotesworth* v. *Stephens*, 4 Hare, 194; *Redhead* v. *Welton*, 30 L. J. Ch. 577.

(*m*) *The Teresa*, 71 L. T. 343.

(*n*) *Wood* v. *Connolly*, (1911) 1 Ch. 731; 80 L. J. Ch. 409.

(*o*) *Earl Beauchamp* v. *Derby*, W. N. (1866) 308 (Inclosure Commissioners).

(*p*) *Hedley* v. *Bates*, 13 C. D. 498; 49 L. J. Ch. 170; *Stannard* v. *Camberwell Vestry*, 20 C. D. 190; 51 L. J. Ch. 629; *In re Britol Medical, &c., General Life Assurance Association*, 32 C. D. 503; 55 L. J. Ch. 416; *Grand Junction Waterworks Co.* v. *Hampton Urban Council*, (1898) 2 Ch. 331; 67 L. J. Ch. 603; *Merrick* v. *Liverpool Corporation*, (1910) 2 Ch. p. 460; 7 L. J. Ch. 751.

not be subjected if the action were brought in another accessible and competent Court (*q*).

Injunctions to restrain proceedings in foreign Courts.

The High Court has also jurisdiction on a proper case being made out to restrain persons within its jurisdiction from prosecuting suits in the Courts of foreign countries (*r*). In the exercise of the jurisdiction the Court does not proceed upon any claim of right to interfere with or control the course of proceedings in the tribunals of a foreign country, or to prevent them from adjudicating on the right of parties when drawn in controversy, and duly presented for their determination. The jurisdiction is founded on the authority vested in Courts of equity over persons within the limits of their jurisdiction, and amenable to process to restrain them from doing acts which work wrong and injury to others, and are therefore contrary to equity and good conscience. As the order of the Court in such cases is pointed solely at the individual, and does not extend to the tribunal where the suit or proceeding is pending, it is immaterial that the party to whom it is addressed is prosecuting his action in the Courts of a foreign country (*s*).

It seems that if the circumstances of the case are such as would have made it the duty of the Court of Chancery under the former procedure to restrain a party from instituting or carrying on proceedings in a Court here, they will warrant the High Court in restraining proceedings in a foreign country (*t*). Thus the indorsee of a bill of exchange was restrained from suing the plaintiff in the Irish Courts upon the bill upon certain equitable grounds which would (under the then

(*q*) *Logan* v. *Bank of Scotland*, (1906) 1 K. B. 141, 150; 75 L. J. K. B. 218; *Egbert* v. *Short*, (1907) 2 Ch. 205; 76 L. J. Ch. 520; *Norton* v. *Norton*, (1908) 1 Ch. 471; 77 L. J. Ch. 312.

(*r*) See *McHenry* v. *Lewis*, 22 C. D. 397; 52 L. J. Ch. 325; *Armstrong* v. *Armstrong*, (1892) P. 98; 61 L. J. P. 63; *Lett* v. *Lett*, (1906) 1 I. R. 618, 635; *Pena Copper Mines Co.* v. *Rio Tinto Co.* (1912), 105 L. T. 852.

(*s*) *Lord Portarlington* v. *Soulby*, 3 M. & K. p. 108; 41 R. R. 23; *Carron Iron Co.* v. *Maclaren*, 5 H. L. C. 416, 437; 24 L. J. Ch. 620; 101 R. R. 229; *Lett* v. *Lett*, *supra*; *Wood* v. *Connolly*, (1911) 1 Ch. p. 744; 80 L. J. Ch. p. 415; *Pena Copper Mines Co.* v. *Rio Tinto Co.*, *supra*.

(*t*) See *Carron Iron Co.* v. *Maclaren*, 5 H. L. C. p. 439; 24 L. J. Ch. 620; 101 R. R. 229; *Wood* v. *Connolly*, *supra*.

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procedure) have warranted a similar injunction against any action in the Courts of this country (*u*). In a recent case (*x*) where a contract provided that the rights and liabilities of the parties thereto should in case of dispute be referred to arbitration in conformity with the provisions of the Arbitration Act, 1889, and that the award of the arbitrators should be a condition precedent to any liability of either party, the Court restrained one of the parties from taking proceedings against the other party in a foreign court except in pursuance of an award under the contract.

Proceedings in different Courts claiming same relief.

Where a plaintiff sues a defendant for the same object in two Courts in this country, such a proceeding is *primâ facie* vexatious, and the plaintiff will, as a general rule, be put to his election as to which action shall be stayed and which proceeded with. The same rule applies where one of the actions is in this country and the other action is in the King's Courts in Scotland or Ireland, or any other part of the King's dominions (*y*). But if one of the actions is in a foreign country where there are different forms of procedure and different remedies, there is no presumption that the multiplicity of actions is vexatious, and a special case must therefore be made out to induce the Court here to interfere by injunction (*z*). It is not vexatious for a plaintiff to bring an action against a defendant relating to the same subject matter in two different countries "where there are substantial reasons of benefit to the plaintiff" in doing so (*a*).

In a case where a decree had been obtained for the execution of the trusts of a deed for the benefit of creditors, and a receiver of real estates in England and Ireland had been appointed, and some of the trustees afterwards filed a bill in Ireland for executing the trusts of the same deed, Lord

(*u*) *Lord Portarlington* v. *Soulby*, 3 M. & K. 104; 41 R. R. 23.

(*x*) *Pena Copper Mines Co.* v. *Rio Tinto Co.* (1912), 105 L. T. 846.

(*y*) *McHenry* v. *Lewis*, 22 C. D. 397; 52 L. J. Ch. 325; *Logan* v. *Bank of Scotland*, (1906) 1 K. B. p. 150; 75 L. J. K. B. p. 222; *Jopson* v. *James*, (1908) 77 L. J. Ch. 824.

(*z*) *McHenry* v. *Lewis*, 22 C. D. 397, 408; 52 L. J. Ch. 325; *Peruvian Guano Co.* v. *Bockwoldt*, 23 C. D. 225, 232; 52 L. J. Ch. 714; *Logan* v. *Bank of Scotland*, (1906) 1 K. B. p. 150; 75 L. J. K. B. p. 222.

(*a*) *Peruvian Guano Co.* v. *Bockwoldt*, 23 C. D. p. 230; 52 L. J. Ch. p. 715.

Eldon restrained them from prosecuting that suit, on the ground that it sought the same relief as might be had under the decree obtained in this country (*b*). So also, where there had been a decree in this country for an account on a bill to redeem a West India mortgage, Sir John Leach would not suffer the mortgagee to prosecute a suit in Jamaica for foreclosing the same mortgage, on the ground that full relief might be had under the decree in this country (*c*). So also, a person was restrained from prosecuting a suit in Ireland after a decree in this country, the subject-matter of the suit being the same as that already adjudicated on in the Court here (*d*). So also where parties who had in a suit here established their right against the defendant instituted proceedings in Scotland against some of the defendants for the same demand, an injunction was obtained at the Rolls against their proceedings in Scotland, and Lord Cottenham confirmed the order (*e*).

So also where a wife had obtained a divorce in the Irish Court, and in settlement of the proceedings had executed a deed releasing her husband from further claims in respect of alimony, the Court restrained her from proceeding with an action which she had subsequently commenced against her late husband in the Argentine Republic for divorce and maintenance (*f*). So also the Court restrained a partner instituting proceedings for dissolution of partnership in the Palatin Court, the Supreme Court of Nova Scotia, where the partnership property was situate, having previously made a decree in an action in which the same relief had been claimed (*g*).

Defendant in English Court not as a rule restrained before decree from suing plaintiff in foreign Court.

A defendant in an English Court in which no decree has been made will not as a general rule be restrained on the ground of vexation from commencing an action against the

(*b*) *Harrison* v. *Gurney*, 2 J. & W. 563; 22 R. R. 211.

(*c*) *Beckford* v. *Kemble*, 1 Sim. & St. 7; 24 R. R. 143; and see *Maclaren* v. *Stainton*, 26 L. J. Ch. 334.

(*d*) *Booth* v. *Leycester*, 1 Keen, 578; on appeal, 3 M. & C. 459; 44 R. R. 75.

(*e*) *Welderburn* v. *Welderburn*, 2 Beav. 208; 4 M. & C. 585, 596; 9 L. J. (N. S.) Ch. 205; 48 R. R. 181. See *Carron Iron Co.* v. *Maclaren*, 5 H. L. C. p. 454; 24 L. J. Ch. 620; 101 R. R. 229.

(*f*) *Leit* v. *Lett*, (1906) 1 I. R. 618.

(*g*) *Jopson* v. *James*, (1908) 77 L. J. Ch. 824.

plaintiff in a foreign Court in respect of the same matter (*h*). Thus the Court refused to restrain a husband who was respondent to a petition by his wife for judicial separation from prosecuting his right to a divorce in the French Court on grounds which would not have entitled him to relief in England, but which were sufficient according to the law of France (*i*).

Even though no decree has been obtained in this country, yet if a suit instituted abroad does not appear so well calculated to answer the ends of justice as the suit here, the Court will restrain the foreign action, imposing, however, terms which it considers reasonable for protecting the party whom it enjoins. Thus in *Bushby* v. *Munday* (*k*), Bushby had given a bond to Munday to secure a gambling debt, and Munday assigned the bond to Clowes. Clowes proceeded in Scotland against Bushby, who was a Scotchman, and a proprietor of real estate. Bushby filed a bill here to have the bond set aside and delivered up. Upon a motion for an injunction to stay the proceedings in Scotland, Sir J. Leach granted the injunction because he considered the validity of the bond could be better tried in the country where the Courts judicially knew the law applicable than in Scotland, where the Courts could only learn the law as a matter of fact to be communicated by way of evidence; and, secondly, that the remedy here, if the obligor should make out his title, would be more complete than could be had in Scotland. He laid it down generally that where parties, defendants, are resident in England, and brought here by subpœna, this Court has jurisdiction to act upon them personally with respect to the objects of the suit, as the ends of justice require, and with that view to order them to take or to omit to take any steps or proceedings in any other Court of justice, whether in this or in a foreign country (*l*). The Vice-Chancellor, therefore, restrained the

(*h*) *Hyman* v. *Helm*, 24 C. D. 536, 540; 49 L. T. 376; *Vardopulo* v. *Vardopulo* (1909), 25 T. L. R. 518.

(*i*) *Vardopulo* v. *Vardopulo*, *supra*.

(*k*) 5 Madd. 297; 21 R. R. 294.

(*l*) 5 Madd. p. 307; 21 R. R. 294. See also *Carron Iron Co.* v. *Maclaren*, 5 H. L. C. pp. 438, 452,

assignee from going on with the Scotch action, putting the plaintiff on such terms in Scotland as would secure to him the preferable lien which he might acquire by his suit on the bond there, if he should ultimately establish any demand on the bond (*m*). So also in *Bunbury* v. *Bunbury* (*n*), Lord Cottenham, affirming a judgment of Lord Langdale (*o*), restrained parties from prosecuting proceedings at law in Demerara to recover real estates there, which involved questions depending on the law of Holland, and also on the law of England, and further questions of account which could only be taken in this country. Lord Cottenham laid it down as a principle that where part of the subject-matter is admitted to be necessarily within the jurisdiction of the Court will take upon itself to determine the whole matter, though it involves questions of foreign law, more especially where the question of foreign law depends to some extent upon the determination of the Court as to the English law. Upon granting the injunction, his Lordship put the plaintiff on terms to submit and carry into effect any order which the Court might think fit to make in respect of the proceedings in Demerara. So also the Court, after a decree for administration, restrained one of the parties interested from prosecuting proceedings in a foreign country in regard to real and personal estate situate there (*p*).

Balance of convenience and inconvenience.

If, however, from any cause it appears likely to be more conducive to substantial justice, or if upon the balance of convenience and inconvenience it appears desirable that the foreign proceedings should be allowed to take their course, the Court will allow them to proceed (*q*). In the proceedings

453; 24 L. J. Ch. 620; 101 R. R. 229; *Wood* v. *Connolly*, (1911) 1 Ch. pp. 745, 746; 80 L. J. Ch. p. 416.

(*m*) See *Carron Iron Co.* v. *Maclaren*, 5 H. L. C. pp. 438—446, 453; 24 L. J. Ch. 620; 101 R. R. 229.

(*n*) 3 Jur. 641; 49 R. R. 785.

(*o*) Ib.; 1 Beav. 318; 8 L. J. Ch. 297; 49 R. R. 373.

(*p*) *Hope* v. *Carnegie*, 1 Ch. 320.

(*q*) See *Pennell* v. *Roy*, 3 De G. M. & G. p. 140; 22 L. J. Ch. 409; 98 R. R. 78; *Transatlantic Co.* v. *Pietroni*, John. 604; 123 R. R. 260; *Perkins* v. *Simonetti*, 29 W. R. [illegible] L. J. P. 30; *Moor* v. *Anglo-[illegible] Bank*, 10 C. D. 681; [illegible]; *McHenry* v. *Lewis*, 22 C. D. 397; 52 L. J. Ch. 325.

in the foreign country are calculated to give a security against the property there, so as to answer the demand under the decree here (*r*), or are necessary in order to protect the property there against the demands of creditors who have not appeared to the suit here, and are not within the jurisdiction (*s*), they will to this extent be allowed to be continued. Thus Lord Eldon restrained a suit for administration in Ireland on the ground that the same relief was sought as could be had under the decree obtained in this Court, but he would not prevent a bill from being filed in Ireland for the mere purpose of calling on a receiver there to account for his receipts and payments (*t*). So also where the Vice-Chancellor had granted an injunction against a heritable bond creditor, who was proceeding in Scotland against the assignees in bankruptcy of the obligor, who had real estate in Scotland, Lord Lyndhurst dissolved the injunction upon a simple consideration of the convenience and inconvenience of the different courses to be adopted (*u*). So also the Court would not restrain the defendant to an action from suing in a foreign country in respect of the same subject-matter during the pendency of the action in England in which the matters in dispute could be determined, there being no evidence to show that the conduct of the defendant was vexatious, and it being possible that the course of procedure in the foreign Court might be such as to give an advantage to the defendant, of which he was entitled to avail himself (*x*). So also the Court refused to restrain a husband who was respondent to a suit by his wife for judicial separation from prosecuting his right to a divoree in France where he had acquired a

(*r*) *Wedderburn* v. *Wedderburn*, 2 Beav. 208; 4 M. & C. 585; 9 L. J. (N. S.) Ch. 205; 48 R. R. 181; *Carron Iron Co.* v. *Maclaren*, 5 H. L. C. p. 454; 24 L. J. Ch. 620; 101 R. R. 229.

(*s*) *Parnell* v. *Parnell*, 7 Ir. Ch. 322.

(*t*) *Harrison* v. *Gurney*, 2 J. & W. 563; 22 R. R. 211; and see *Carron Iron Co.* v. *Maclaren*, 5 H. L. C. p. 437; 24 L. J. Ch. 620; 101 R. R. 229.

(*u*) *Jones* v. *Geddes*, 1 Ph. 724; and see *Carron Iron Co.* v. *Maclaren*, H. L. C. p. 454; 24 L. J. Ch. 620; 101 R. R. 229.

(*x*) *Hyman* v. *Helm*, 24 C. D. 531, 49 L. T. 376; and see *Vardopulo* v. *Vardopulo* (1909), 25 T. L. R. 518.

domicil, and thereby obtaining relief to which he was not in the circumstances entitled by English law (*y*).

In a case where a receiver had been appointed, in a debenture-holders' action, of the undertaking and assets of a company, which comprised a debt due to the company from a French firm, and subsequently P. & Co., an English firm, who were creditors of the company, took proceedings in France for the purpose of attaching the debt due to the company from the French firm, and the plaintiffs in the debenture-holders' action thereupon applied for an injunction to restrain P. & Co. from intercepting or attaching, or attempting to obtain payment of the moneys due from the French firm. It was held that the charge created by the debentures did not entitle the debenture-holders to prevent P. & Co. from enforcing any rights given them by French law over the debt in question, which must be regarded as a French asset of the company, and that the attachment, which alone was recognised by the law of France, ought to prevail over the title of the debenture-holders (*z*).

Limits of the jurisdiction to restrain actions and suits in other countries.

The jurisdiction of the Court in restraining proceedings in foreign Courts, is in general limited to the case of persons who are within the power or the reach of the Court. The Court will not, unless under very special circumstances, interfere with the right of a foreigner resident abroad, who has not sought relief under a decree, or appeared in a suit here, to recover his debt according to the laws of his own country. The circumstance that a foreigner resident abroad may have property within this country, or may have a house of agency here, does not give the Court jurisdiction (*a*). There may

(*y*) *Vardopulo* v. *Vardopulo*, *supra*. See *Von Eckhardstein* v. *Von Eckhardstein* (1907), 23 T. L. R., where the Court refused to stay a wife's suit for judicial separation, her husband having subsequently taken proceedings in Germany for divorce for "wifely disobedience."

(*z*) *In re Maudslay, Sons and Field*, (1900) 1 Ch. 602; 69 L. J. Ch. 347; and see *Derwent Rolling Mills Co.* (1904), 21 T. L. R. 81, 701.

(*a*) *Carron Iron Co.* v. *Maclaren*, 5 H. L. C. 416; 24 L. J. Ch. 620; 101 R. R. 229; *Sudlow* v. *Dutch-Rhenish Railway Co.*, 21 Beav. 43; *Re Boyse*, 15 C. D. 592; 49 L. J. Ch. 689.

be cases in which the Court will restrain a foreigner domiciled in another country from proceeding to obtain payment of debts according to the law of the country in which he is domiciled, but a very strong case must be made out (*b*). In interfering to restrain actions prosecuted in other countries, the Court will be very cautious as to extending its jurisdiction under the colour of carrying out its principles. Where the case made out is simply one of interference by a stranger (who is within the Court's jurisdiction) with the property of another, upon an assumption of right, in a mode which is warranted by the law of a foreign country, although it may not be warranted by English law, this constitutes no foundation for the interference of the Court (*c*). To do so would be to assume a jurisdiction to prescribe the Courts in which parties should bring their suits, without there being anything to affect the conscience of the parties, upon the simple ground that the suits were such as in the opinion of this Court ought not to be maintained, and thus to bring under the decision of the Court the question whether suits in other Courts could be maintained, a question which it is for those Courts and not for this Court to determine (*d*). Where, therefore, a debtor became bankrupt in England, having real estate in Scotland, a creditor who had not proved under the bankruptcy was not restrained from proceeding in an action against the assignees in Scotland for the purpose of recovering out of the real estate there an amount equal to the dividend, which would have been payable on the debt (*e*). In a case where an intestate's estate was the subject of an action in Madeira, the Court would not restrain the agent of the administratrix in England from sending over money of the intestate to Madeira (*f*), on the ground that the Court must take it for granted that the Court in Madeira would do justice (*g*).

(*b*) *Maclaren* v. *Stainton*, 26 L. J. Ch. 332.

(*c*) *Pennell* v. *Roy*, 3 De G. M. & G. p. 139; 22 L. J. Ch. 416; 98 R. R. 78.

(*d*) Ib.

(*e*) *Pennell* v. *Roy*, 3 De G. M & G. 126; 22 L. J. Ch. 409; 98 R. R. 78.

(*f*) *Wallace* v. *Campbell*, 4 Y. & C. 167; 54 R. R. 464.

(*g*) Ib., 4 Y. & C. p. 168; 54 R. R. 464; see *Pennell* v. *Roy*, 3 De G. M. & G. p. 140; 22 L. J. Ch.

Power of Court to stay or restrain proceedings against company in liquidation.

Under the Companies (Consolidation) Act, 1908 (*h*), the Court may at any time after the presentation of a petition to wind up a company, and before a compulsory or supervision winding-up order has been made, stay any action or proceeding against the company pending in the High Court or Court of Appeal in England or Ireland, and restrain any other action or proceeding pending against the company, on such terms as the Court thinks fit.

When an order has been made for winding up a company compulsorily or subject to supervision, no action or proceeding can be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose (*i*), and where a company registered in England or Ireland is being wound up by or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up is void (*k*).

The Court may also stay or restrain actions and proceedings against a company which is being wound up voluntarily (*l*).

Accordingly, when a company is in liquidation, the Court has power to restrain by injunction actions and proceedings against the company in the inferior Courts (*m*), in Scot-

417; 98 R. R. 78; *Fletcher* v. *Rodgers*, 27 W. R. 97; *Daukins* v. *Simonetti*, 29 W. R. 228, W. N. (1880) 201; *Vardopulo* v. *Vardopulo* (1909), 25 T. L. R. 518.

(*h*) 8 Edw. 7, c. 69, ss. 140, 200. By sects. 265, 270 actions and proceedings against contributories of a company registered under Part VII. of the Act, and of unregistered companies, may be stayed or restrained. As to stay of proceedings in bankruptcy, see Bankruptcy Act, 1883, s. 10 (2).

(*i*) 8 Edw. 7, c. 69, ss. 142, 203 (2). As to companies registered under Part VII. of the Act, and the contributories of such companies, and of unregistered companies, see sects. 266, 271.

(*k*) Ib., sect. 211.

(*l*) Ib., sect. 193, and see *In re Keynsham Co.*, 33 Beav. 123; 8 L. T. 687; *In re Sablonicre Hotel Co.*, L. R. 3 Eq. 74; 15 L. T. 298; *In re Dry Dock Corporation of London*, 39 C. D. 306; 58 L. J. Ch. 33; *In re Roundwood Collieries Co.*, (1897) 1 Ch. 373; 66 L. J. Ch. 186; *Currie* v. *Consolidated Kent Collieries Co.*, (1906) 1 K. B. 134; 75 L. J. K. B. 199.

(*m*) Sect. 140, sub-s. (b).

land (*n*), or Ireland (*o*), and, when the claimant is within the jurisdiction, actions and proceedings against the company abroad (*p*).

Proceedings by incumbrancer of company.

But an incumbrancer on immovable property situate in a foreign country, who has instituted legal proceedings in that country for the purpose of enforcing his rights, will not be restrained by injunction from prosecuting such proceedings, even though the mortgagor is a company in course of winding up (*q*). So also, where, prior to the commencement of the winding up of an English company, a creditor had arrested property of the company in Scotland *jurisdictionis fundandæ causâ*, and had followed this up by bringing an action in Scotland and making an arrestment on the dependence of the action, it was held that he had become, subject to his obtaining a decree in such action, a secured creditor, and ought not to be restrained from continuing his action (*r*).

Injunction to restrain presentation of winding-up petition.

The Court will restrain by injunction a person claiming to be a creditor of a company from presenting a petition to wind up the company, where the debt is *bonâ fide* disputed and the company is solvent (*s*). So also if a petition has not been presented in good faith and for the purpose of obtaining a winding-up order, but in order to put pressure on the company, the Court will restrain the advertisement of the petition, and stay all further proceedings upon it (*t*).

(*n*) See sect. 180, and *In re Thurso New Gas Co.*, 42 C. D. 486, 493; 61 L. T. 351.

(*o*) See sect. 180, and *In re International Pulp and Paper Co.*, 3 C. D. 594; 45 L. J. Ch. 446.

(*p*) *In re Oriental Inland Steam Co.*, 9 Ch. 557; 43 L. J. Ch. 699; *In re Central Sugar Factories Co.*, (1894) 1 Ch. 369; 63 L. J. Ch. 410.

(*q*) *Moor* v. *Anglo-Italian Bank*, 10 C. D. 681; 40 L. T. 620.

(*r*) *In re West Cumberland Iron and Steel Co.*, (1893) 1 Ch. 713; 62 L. J. Ch. 367; and see *In re Derwent Rolling Mills Co.* (1905), 21 T. L. R. 81, 701.

(*s*) *Cadiz Waterworks Co.* v. *Barnett*, 19 Eq. 182; 44 L. J. Ch. 529; *Cercle Restaurant Castiglione Co.* v. *Lavery*, 18 C. D. 555; 50 L. J. Ch. 837; *Niyer Merchants Co.* v. *Capper*, 18 C. D. 557 n.; 25 W. R. 365; *New Travellers' Chambers* v. *Cheese*, 70 L. T. 271.

(*t*) *In re A Company*, (1894) 2 Ch. 349; 63 L. J. Ch. 565.

CHAPTER XXI.

INJUNCTIONS TO RESTRAIN WRONGFUL ACTS OF A SPECIAL NATURE.

Injunctions to restrain the transfer of stock.

THE Court will upon a sufficient case being made out restrain an improper transfer of stock (*a*). When a transfer is about to be made to wrong persons through mistake, the Court will not grant an injunction *ex parte* against the defendant to restrain the transfer, unless the plaintiff swears that he believes the defendant will avail himself of the error, and refuse to make a re-transfer (*b*).

The Bank of England is not bound to take notice of any trust affecting public stock standing in its books; all that it has to do is to look to the legal title, and therefore if the person having the legal title applies for a transfer to himself, the Bank must permit such transfer accordingly (*c*). The interest of any stockholder dying is transferable by his executors or administrators, notwithstanding any specific bequest thereof (*d*).

The Banks of England and Ireland respectively before allowing any transfer of stock may, if the circumstances of the case appear to them to make it expedient, require strict evidence of the title of any persons claiming a right to make the transfer (*e*).

Injunctions to restrain the Bank from permitting transfer of stock, shares, &c.

An injunction may be had under 39 & 40 Geo. III., c. 36, to restrain the Bank of England from permitting the transfer of stock or paying dividends (*f*). It is not necessary, as a

(*a*) See *Stead* v. *Clay*, 4 Russ. 550; 6 L. J. (O. S.) Ch. 138; 28 R. R. 169; *Glasse* v. *Marshall*, 15 Sim. 71; *Lord Chedworth* v. *Edwards*, 8 Ves. 46; 6 R. R. 212.

(*b*) *Arkwright* v. *Gryles*, 13 L. J. (N. S.) Ch. 303.

(*c*) See *Bank of England* v. *Moffat*, 3 Bro. C. C. 260; 5 Ves. 664; *Franklin* v. *Bank of England*, 1 Russ. 575; *Adam* v. *Bank of England* (1908), 52 S. J. 682.

(*d*) 33 & 34 Vict. c. 71, s. 23.

(*e*) Ib. sect. 24. See *Prosser* v. *Bank of England*, 13 Eq. 611; 41 L. J. Ch. 327.

(*f*) *Ross* v. *Sherer*, 5 Madd. 458; 6 Madd. 1.

rule, to make the Bank a party (*g*). The application may be made upon notice, or *ex parte* on affidavit verifying the urgency of the case (*h*). If after giving notice to the Bank, the plaintiff does not apply for an injunction, or take further proceedings, the defendant may obtain an order that the Bank permit the transfer on a given day, unless in the meantime an injunction shall be granted (*i*).

By 5 Vict. c. 5, s. 4, the Court may upon motion or petition of the party interested, in a summary way without a writ of summons issued, restrain the Bank or any public company from permitting the transfer of stock in the public funds, or any stock or shares in any public company, standing in any names in their books, or from paying any dividends due or to become due thereon; and the order is to specify the amount of the stock or the particular shares, and the names in which the same may be standing (*k*).

The application may be made *ex parte* by motion or petition (*l*), supported by an affidavit verifying the grounds upon which it is made (*m*). The motion paper or petition should be entitled in the matter of the Act and of the person applying, and if the applicant is a trustee, the proceedings should be also entitled in the matter of the trust (*n*).

The order must be served on the Chief Accountant of the Bank of England, if that Corporation be restrained, or upon the Secretary or other proper officer of any other public company restrained by the order by delivery to the persons served of an office copy of the order (*o*).

(*g*) 39 & 40 Geo. 3, c. 36. See *Eldridge* v. *Eldridge*, 3 Madd. 386; *Temple* v. *Bank of England*, 6 Ves. 769.

(*h*) *Hammond* v. *Maundrell*, 6 Ves. 772 a. n.; *Doolittle* v. *Walton*, 2 Dick. 442.

(*i*) *Ross* v. *Sherer*, 5 Madd. 458; 6 Madd. 1.

(*k*) See *In re Blaksley's Trusts*, 23 C. D. 549; 48 L. T. 776. A Government annuity is within the clause; *Ex parte Watts*, W. N. (1871) 26; 19 W. R. 400.

(*l*) See *Blaksley's Trusts*, *supra*; *Re Pike*, W. N. (1902) 42.

(*m*) *Ex parte Field*, 1 Y. & C. C. C. 1; *In re Hertford*, 1 Hare, 584; 11 L. J. Ch. 317.

(*n*) *Re Blaksley's Trusts*; *Re Pike*, *supra*.

(*o*) Dan. Ch. Pr. 1379.

The restraining order under the Act (*p*) is, it seems, only intended to be for *interim* purposes, namely, to protect the stock until the party claiming it should have an opportunity of asserting his rights by action in the ordinary way (*q*).

Any person interested may apply to discharge or vary the order (*r*); the application is made by motion with notice to the person by whom the order was obtained and should be supported by affidavit (*s*). On the hearing of the application the Court may discharge or vary the order and award such costs as to the Court may seem fit (*t*).

Restraining order in the nature of a *distringas*.

The transfer of stock or shares, or the payment of dividends thereon, could under the former procedure be restrained by writ of *distringas*, which under 5 Vict. c. 5, s. 5, could be issued against any public company, whether incorporated or not, in whose books any stock or shares might be standing in which or in the dividends of which the applicant claimed to be interested. But under the present procedure no writ of *distringas* is to be issued (*u*). Any person however claiming to be interested in any stock (*x*) standing in the books of a company (*y*) may, on making an affidavit in the prescribed form (*z*), with such variations as circumstances may require, and on filing the same in the Central Office or any district registry, with a notice in or to the effect of the prescribed form (*a*), and on procuring an office copy of the affidavit and a duplicate of the filed notice authenticated by the seal of the Central Office, or any district registry, serve the office copy of the affidavit and the duplicate notice on the company (*b*),

(*p*) 5 Vict. c. 5.

(*q*) *In re Hertford*, 1 Ha. 584, 590; 11 L. J. Ch. 317.

(*r*) 5 Vict. c. 5, s. 4.

(*s*) *Ex parte Amyot*, 1 Ph. 130 n.; *In re Hertford*, 1 Ha. p. 590; 11 L. J. Ch. 317.

(*t*) *In re Hertford*, 1 Ha. 584; 11 L. J. Ch. 317.

(*u*) Ord. XLVI. r. 2. Sect. 5 of 5 Vict. c. 5 has been repealed by the Statute Law Revision Act, 1892.

(*x*) The word "stock" includes shares, securities, and dividends thereon; ib. r. 3.

(*y*) The word "company" includes the Governor and Company of the Bank of England and any other public company whether incorporated or not; ib. r. 3.

(*z*) See as to form, R. S. C., Appendix B., Pt. II., No. 27.

(*a*) Ib. No. 22.

(*b*) Ord. XLVI. r. 4. See *Adam* v. *Bank of England* (1908), 52 S. J. 682.

and the service of the office copy of the affidavit and of the duplicate of the filed notice will have the same effect against the company as if a writ of *distringas* in respect of the stock had been issued under 5 Vict. c. 5, s. 5 (*c*).

There must be appended to the affidavit a note stating the person on whose behalf it is filed and to what address notices, if any, for that person are to be sent (*d*), and all such notices shall be deemed to have been duly sent, if sent through the post by a prepaid letter, directed to that person at the address so stated or at any substituted address, whether the person to whom the notice is sent is living or not (*e*).

If, while the notice is in force, the company on whom it has been served receives from the person in whose name the stock is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred or to pay the dividends thereon, the company is not by force or in consequence of the service of the notice, authorised without the order of the Court to refuse to permit the transfer to be or to withhold the payment of the dividends for more ight days after the date of the request (*f*). The compan on receiving such a request should serve a written notice on the person on whose behalf the notice was given stating that an application has been made for the stock or dividends and that unless an action is brought and an injunction obtained and served on or before a specified day (usually within the eight days above mentioned) the notice will be no longer regarded. A motion having been in such a case made for an *ex parte* notice to restrain the bank from permitting the transfer or paying the dividends, it was held to be the proper course to grant an *interim* injunction over the next motion day and that notice of the order must be served on the legal owner of the stock (*g*).

A notice filed under the preceding provisions may be with-

(*c*) Ord. XLVI. r. 8.

(*d*) Ib. r. 5.

(*e*) Ib. r. 6. See as to alteration of address, ib. r. 7; and as to amending the description of stock referred to in the filed notice, see r. 11.

(*f*) Ord. XLVI. r. 10.

(*g*) *Re Blakeley's Trusts*, 23 C. D 549; 48 L. T. 776

drawn at any time by the person by whom or on whose behalf it was given on a written request signed by him, or its operation may be made to cease by an order to be obtained by motion on notice or by petition or by summons at chambers duly served by any other person claiming to be interested in the stock sought to be affected by the notice (*h*).

Stop orders.

Where monies or securities are standing in Court, a person interested therein may obtain a stop order, the effect of which is to prevent the payment or transfer of the same without notice to the applicant (*i*). Any person applying for a stop order is not required to serve the parties interested in such parts of the monies or securities as are not sought to be affected (*k*).

Injunctions against sale.

The Court will, on a proper case being made, interfere to prevent a sale. Thus trustees have been, under the circumstances of the case, restrained from selling until it should have been ascertained what would be most for the benefit and welfare of the *cestuis que trustent* (*l*). So also where a vendor had power to sell, but it was questionable whether the sale was being made properly in pursuance of the power, the sale was stayed (*m*). So also a company was restrained from acting upon a resolution for the sale of its undertaking under sect. 192 of the Companies (Consolidation) Act, 1908, to a foreign company (*n*). So also where a foreign vessel was driven into Plymouth by stress of weather, an injunction was grsnted, at the instance of the supercargo and part owner, to prevent the master from selling the cargo (*o*). So also where the representatives of a mortgagor had obtained the mortgage deeds from the mortgagee by fraud, an injunction was granted to restrain the defendants from selling or mortgaging the estate (*p*). So also an infant who had obtained a lease of a furnished house on a representation that he was of

(*h*) Ord. XLVI. r. 9.

(*i*) Ib. r. 12.

(*k*) Ib. r. 13.

(*l*) *Wiles* v. *Gresham*, 1 Eq. Rep. 48; *Marshall* v. *Sladden*, 7 Ha. 428; 4 De G. & Sm. 168; 19 L. J. Ch. 57; 82 R. R. 159; and see *ante*, p. 521.

(*m*) *Hawes* v. *James*, 1 Wils. Ch. 2.

(*n*) *Thomas* v. *United Butter Companies of France*, (1909) 2 Ch. 484; 79 L. J. Ch. 14; see sect. 285 of the Act of 1908 as to definition of "company." Under sects. 161, 162 of the Companies Act, 1862, a sale might be made to a foreign company: *In re Irrigation Co. of France*, 6 Ch. 176; 40 L. J. Ch. 433.

(*o*) *Delafield* v. *Guanabens*, Dan. Ch. Pr. 1362, 7th ed.

(*p*) *Wallis* v. *Wallis*, ib.

full age, was ordered to deliver up possession of the premises, and was restrained from parting with the furniture (*q*). So also where the defendant had agreed to give the plaintiffs the "first refusal" of certain property, the Court restrained the defendant from selling property without having first offered it to the plaintiffs at the price that an intending purchaser was offering (*r*). So also any vexatious alienations during the progress of a suit will be restrained (*s*).

In an action by an equitable mortgagee for sale or foreclosure the Court granted an injunction to restrain the mortgagor from dealing with the legal estate, there being ground for believing that the mortgagor intended to part with the legal estate *pendente lite* (*t*).

Pending an appeal the Court will sometimes stay the sale of property directed by the decree to be sold, but if the property consists of personal chattels remaining in the possession of the appellant, he must give ample security for the value (*u*).

In a case in which a wife had obtained a decree *nisi* for the dissolution of her marriage, and an order had been made that the husband should secure a sum for her maintenance, and that for such purpose it should be referred to one of the conveyancing counsel to draw a deed, the Court granted an injunction restraining the husband from parting, or otherwise dealing with his interest in certain property until the execution of the deed (*x*).

Trustees for sale will not be restrained from selling because

(*q*) *Lempriére* v. *Lang*, 12 C. D. 675; 41 L. T. 378; see *Stocks* v. *Wilson*, (1913) 2 K. B. p. 242; 82 L. J. K. B. p. 602; *Leslie* v. *Shiel*, (1913) 29 T. L. R. 554.

(*r*) *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, (1901) 2 Ch. 37; 70 L. J. Ch. 468.

(*s*) *Powell* v. *Wright*, 7 Beav. 444; *Beyfus* v. *Bullock*, 7 Eq. 391; 20 L. T. 166; *Hart* v. *Herwig*, 8 Ch. 860; 42 L. J. Ch. 457. After an order for foreclosure *nisi*, and before the order is made absolute, the mortgagee cannot sell without the leave of the Court, so as to confer a good title on anyone other than a *bonâ fide* purchaser for value without notice: *Stevens* v. *Theatres, Ltd.*, (1903) 1 Ch. 857; 72 L. J. Ch. 764; *Halkett (Earl)* v. *Dudley*, (1907) 1 Ch. p. 603; 76 L. J. Ch. p. 337.

(*t*) *London and County Banking Co.* v. *Lewis*, 21 C. D. 490; 31 W. R. 233. As to restraining sales by mortgagees, see *ante*, p. 539.

(*u*) *Nerot* v. *Burnand*, 2 Russ. 56; 26 R. R. 12.

(*x*) *Newton* v. *Newton*, (1896) P. 36; 65 L. J. P. 15; and see *Waterhouse* v. *Waterhouse*, (1893) P 284; 62 L. J. P. 115; cf. *Burmester*

they cannot show a good title (*y*). A trustee for sale may not avoid a fair and unobjectionable contract by entering into a subsequent contract for a higher price (*z*).

When the thing about to be sold is in the nature of a specific chattel, which cannot be the subject of adequate compensation by damages, the defendant will be restrained by injunction (*a*). So also when a chattel necessary for conducting a particular business is in the possession of persons who claim a lien upon it, and threaten an immediate sale, the Court has jurisdiction to interfere by injunction and prevent irreparable injury to the debtor by giving him an opportunity of redeeming it (*b*). A man, however, who has put a fixed price on a specific chattel, cannot be heard to say that damages at law would not be a sufficient remedy (*c*).

If a fiduciary relation exists between the parties, the right of a man who entrusts goods to another to be protected in the beneficial enjoyment of his property *in specie* is not confined to articles possessing any peculiar or intrinsic value. Whatever the description of the chattels may be, the Court will interfere to prevent a sale either by the party entrusted with the goods, or by a person claiming under him through an abuse of power (*d*). An agent, accordingly, was restrained from parting with the possession of furniture and household effects by which the plaintiff's title to the same would be embarrassed (*e*).

If a plaintiff makes out a *primâ facie* case of being entitled to a vendor's lien, the Court will restrain the purchaser from selling the property until the hearing (*f*).

If goods have been wrongly seized by a sheriff, the Court

v. *Burmester*, (1913) P. 78; 82 L. J. P. 55.

(*y*) *Roberts* v. *Bozon*, 3 L. J. Ch. (O. S.) 113.

(*z*) *Goodwin* v. *Fielding*, 4 De G. M. & G. 104; 102 R. R. 39.

(*a*) *Tonnins* v. *Prout*, 1 Dick. 387 (diamonds); *Ridgway* v. *Roberts*, 4 Ha. 106 (a ship); and see *Falcke* v. *Gray*, 4 Drew. 651; 29 L. J. Ch. 28; 113 R. R. 493 (china jars); *Nuthrown* v. *Thornton*, 10 Ves. 159 (stock on farm); and see *Fothergill* v. *Rowland*, 17 Eq. p. 139; 43 L. J. Ch. 252.

(*b*) *North* v. *Great Northern Railway Co.*, 2 Giff. 64; 29 L. J. Ch. 301.

(*c*) *Dowling* v. *Betjemann*, 2 J. & H. 544; 10 W. R. 574 (a picture).

(*d*) *Wood* v. *Rowcliffe*, 3 Ha. 304; 13 L. J. Ch. 293; 2 Ph. 382; 17 L. J. Ch. 83; 64 R. R. 303. See *Pooley* v. *Budd*, 14 Beav. 34.

(*e*) *Wood* v. *Rowcliffe*, *supra*.

(*f*) *Blakeley* v. *Dent*, 15 W. R. 663.

will, upon a proper case being made out, restrain him from remaining in possession or selling the goods (*g*); but the usual course is for the sheriff, after receiving notice of conflicting claims, to take out an interpleader summons, and for the rights of the parties to be determined upon the hearing of such summons (*h*).

The Court may, under 22 & 23 Vict. c. 61, s. 5, restrain a husband against whom a decree of divorce has been obtained from selling or incumbering real estate comprised in a post-nuptial settlement (*i*).

Where a vessel has become unable to proceed on her voyage without repairs, the owners of goods shipped on board the vessel may obtain the assistance of the Court to restrain the captain from selling the cargo. But before the Court will grant such assistance, the plaintiffs must show their title to the goods, and must settle with the captain for what is due to him, and must exonerate the captain from his contract to deliver the goods at the place of destination, and from all liability on the bills of lading (*k*).

Where the sale of a mortgaged estate has been effected under the judgment of a Court of competent jurisdiction in a colony, and no case of fraud is made out, equity has no jurisdiction to interfere by injunction (*l*).

Injunction against the negotiation of securities, &c.

If there is danger that a negotiable instrument fraudulently or improperly obtained, or which ought not to be negotiated, will get into the hands of a *bonâ fide* holder without notice, to the prejudice of the maker or acceptor, or persons interested in the same, the Court will interfere to restrain the negotiation, assignment, or endorsement of the instrument, and will order it to be delivered up (*m*).

(*g*) See *Hilliard* v. *Hanson*, 21 C. D. 69; 31 W. R. 151; *Aylwin* v. *Evans*, 52 L. J. Ch. 105; 47 L. T. N. S. 568.

(*h*) Ord. LVII.; *Hilliard* v. *Hanson*, 21 C. D. 71, 72; 31 W. R. 151.

(*i*) *Watts* v. *Watts*, 24 W. R. 623.

(*k*) *Rayne* v. *Benedict*, 10 L. J. Ch. 297.

(*l*) *White* v. *Hall*, 12 Ves. 321. Cf. *Lord Cranstown* v. *Johnston*, 3 Ves. p. 182; 3 R. R. 80; and see *Bank of Africa* v. *Cohen*, (1909) 2 Ch. p. 146; 78 L. J. Ch. p. 780; *British South Africa Co.* v. *De Beers Consolidated Mines Co.*, (1910) 2 Ch. pp. 513, 514; 80 L. J. Ch. p. 77; reversed on other grounds, (1912) A. C. 52; 81 L. J. Ch. 137.

(*m*) *Hood* v. *Aston*, 1 Russ. 412;

In *Bank of England* v. *Anderson* (*n*), an injunction was granted at the suit of the Bank to restrain a banking company, carrying on business within the distance of sixty-five miles from London, from accepting a bill of exchange payable at less than six months from the time of giving such acceptance (*o*).

An injunction may, upon a proper case being made out, be obtained restraining the defendant from parting with documents in his possession belonging to the plaintiff, and from preventing the plaintiff and his solicitor from having access to the documents at reasonable times after reasonable notice (*p*).

In *Glasse* v. *Marshall* (*q*), the East India Company were restrained from paying over the principal and interest secured upon East India Bonds to a person who had wrongfully obtained possession of them, or to any other person than the lawful owner.

Injunction against parting with property.

The Court will not grant an injunction to restrain a man who is alleged to be a debtor from parting with (*r*) or dealing with (*s*) his property as he pleases. Where no order has been made by the Court for the payment of money, the Court has no power to make an order to restrain a man from removing his property out of the jurisdiction or otherwise dealing with it (*t*). But if an order has been made for the payment of money, the Court will restrain a man from dealing with his property so as to put it out of the control of the Court (*u*),

25 R. R. 93; *Green* v. *Pledger*, 3 Ha. 165; *Thiedemann* v. *Goldsmidt*, 1 De G. F. & J. 4; 8 W. R. 14; 125 R. R. 324; *Hawkins* v. *Troup*, 7 T. L. R. 104; *Day* v. *Longhurst*, (1893) W. N. 3; 62 L. J. Ch. 334.

(*n*) 2 Keen, 328; 7 L. J. (N. S.) Ch. 265; 44 R. R. 271.

(*o*) See *Bank of England* v. *Booth*, 2 Keen, 466; 7 L. J. Ch. 261; 7 Cl. & Fin. 509; 44 R. R. 27.

(*p*) *Goodale* v. *Goodale*, 16 Sim. 316.

(*q*) 15 Sim. 71.

(*r*) *Robinson* v. *Pickering*, 16 C. D. pp. 661, 663; 50 L. J. Ch. 527.

(*s*) Ib.; *Mills* v. *Northern Railway of Buenos Ayres Co.*, 5 Ch. 621; 23 L. T. 719.

(*t*) *Newton* v. *Newton*, 11 P. D. 11; 55 L. J. P. 13; *Burmester* v. *Burmester*, (1913) P. 76; 82 L. J. P. 55.

(*u*) *Sidney* v. *Sidney*, 17 L. T. N. S. 9; *Gillett* v. *Gillett*, 14 P. D. 158; 58 L. J. P. 84; *Waterhouse* v. *Waterhouse*, (1893) P. 284; 62 L. J. P. 115; *Newton* v. *Newton*, (1896) P. 36; 65 L. J. P. 15; decided on sect. 32 of the Matrimonial Causes Act, 1857, now the Matrimonial Causes Act, 1907, ss. 1 and 2, and *Cummins* v. *Perkins*, (1899) 1 Ch. 16, 20; 68

and will restrain him from receiving money due to him from third persons, and also restrain them from paying it to him (*x*).

Appointment of receiver by way of equitable execution.

Upon an *ex parte* application by a judgment creditor for leave to issue a summons for the appointment of a receiver of the judgment debtor's property by way of equitable execution, an injunction restraining the judgment debtor from dealing with his property until after the hearing of the application is not granted as a matter of course, but only if the Court is satisfied that there is some danger of the property being made away with by the judgment debtor (*y*).

Dispute as to appointment of administrator.

Where there was a dispute as to the appointment of an administrator, the Court restrained one of the parties who was in possession of the personal estate of the deceased from disposing or removing any of the estate of the intestate (*z*).

Acts of foreign government.

Although the Court has no jurisdiction to interfere with the sovereign acts of a foreign government, or to make a decree against a foreign ambassador or public minister who does not submit to the jurisdiction (*a*), an injunction may be had restraining a third party from handing over to a foreign ambassador a fund, the right to which is in dispute (*b*), or restraining the agent of a foreign government from parting with securities which ought to be deposited in this country as security to bondholders (*c*). A foreign sovereign may submit to the jurisdiction of the Courts here, but such submission cannot take place until the jurisdiction is invoked. The fact, therefore, that a foreign sovereign has been residing in this country and has entered into a contract here, under an assumed name as being a private individual, does not amount to a submission to the jurisdiction, or render him liable to be sued for breach of such contract (*d*).

L. J. Ch. p. 59; *Bullus* v. *Bullus*, (1910) 102 L. T. 399; 26 T. L. R. 330; see also *Sturges* v. *Warwick (Countess of)*, (1913) 30 T. L. R. 113.

(*x*) *Bullus* v. *Bullus*, *supra*.

(*y*) *Lloyds Bank* v. *Medway Upper Navigation Co.*, (1905) 2 K. B. 359; 74 L. J. K. B. 851. See R. S. C. Ord. L., r. 15 (a), App. K. Form No. 61 (a).

(*z*) *Brand* v. *Mitson*, 24 W. R. 524.

(*a*) *Ante*, p. 8.

(*b*) *Gladstone* v. *Musurus Bey*, 1 H. & M. 495; 32 L. J. Ch. 155.

(*c*) *Foreign Bondholders* v. *Pastor*, 23 W. R. 109; 31 L. T. 567.

(*d*) *Mighell* v. *Sultan of Johore* (1894) 1 Q. B. 149; 63 L. J. Q. B. 593. See *Statham* v. *Statham and*

Injunctions to restrain arbitrators from making awards.

The Court will not, as a rule, restrain a party from proceeding with an arbitration in a matter beyond the agreement to refer, although such arbitration proceeding may be futile and vexatious (*e*). But the Court may restrain a party from proceeding with an arbitration if an action is pending impeaching the instrument which contains the agreement to refer (*f*). Moreover, the conduct of the parties may found a sufficient ground for the interference of the Court (*g*). An injunction accordingly may be had to restrain an arbitrator from proceeding with a reference on the ground of corruption (*h*). So also if it is discovered in the course of the arbitration by one of the parties, to whom it was at first unknown, that the arbitrator has an interest in the subject-matter of the award, or if the arbitrator has misconducted himself or has ceased to be a free agent, so as to be obviously unfit for the exercise of such functions, the Court will restrain him from acting (*i*).

The rule, however, which applies to a person holding judicial office, that he ought not to hear cases in which he might be suspected of a bias, does not apply to an arbitrator named in a contract to whom both parties have agreed to refer disputes. In order to justify the Court in saying that such an arbitrator is disqualified from acting, circumstances must be shown to exist which establish at least a probability that he will in fact be unfairly biased in favour of one of the parties in giving his decision (*k*). Accordingly, where a con-

the Gaekwar of Baroda, (1912) P. p. 94; 81 L. J. P. p. 34; *In re Republic of Bolivia Exploration Syndicate*, (1913) W. N. 329.

(*e*) *North London Railway Co.* v. *Great Northern Railway Co.*, 11 Q. B. D. 30; 52 L. J. Q. B. 380; and see *Wood* v. *Lillies*, 61 L. J. Ch. 158; *Farrar* v. *Cooper*, 44 C. D. 323; 59 L. J. Ch. 506.

(*f*) *Kitts* v. *Moore*, (1895) 1 Q. B. 253; 64 L. J. Ch. 152.

(*g*) *Law* v. *Garrett*, 8 C. D. 26, 37; *Kirchner* v. *Gruban*, (1909) 1 Ch. 419, 422; 78 L. J. Ch. p. 118.

(*h*) *Malmesbury Railway Co.* v. *Budd*, 2 C. D. 113; 45 L. J. Ch. 271.

(*i*) *Beddow* v. *Beddow*, 9 C. D. 89; 47 L. J. Ch. 588; *Jackson* v. *Barry Railway Co.*, (1893) 1 Ch. 238, 249; 68 L. T. 472. See *Blackwell & Co.* v. *Derby Corporation*, (1911) 75 J. P. 129; *Bristol Corporation* v. *Aird*, (1913) A. C. 241; 82 L. J. K. B. 684, where the Court refused to stay actions under sect. 4 of the Arbitration Act, 1889, and refer them to arbitration.

(*k*) *Eckersley* v. *Mersey Docks*, (1894) 2 Q. B. 667; 71 L. T. 308; *In re Haigh and London and*

tract contained a provision referring disputes to the engineer of the employers, and disputes having arisen the contractors brought an action for the purpose of having the same determined, the Court ordered a stay under sect. 4 of the Arbitration Act, 1889, notwithstanding the fact that the engineer would, in substance, be acting as a judge in his own cause; no sufficient reason having been given for suspecting that the engineer would act unfairly (*l*). So also where a contract contained a clause providing that all disputes should be referred to a certain barrister, and during the proceedings a charge of misconduct was made against a firm of solicitors who were clients of the barrister, the Court refused to stay the arbitration, there being no charge of incompetence or bias against the barrister (*m*).

Umpire.

Where an umpire has been irregularly appointed, the Court will restrain him from acting (*n*).

Injunctions between husband and wife.

The Court will restrain a husband from disposing of or intermeddling with his wife's separate estate (*o*); from entering her house, not for the purpose of consorting with her as his wife, but in order to deal with it as being his own property (*p*); from molesting or interfering with her in a business which has been assigned to her separate use (*q*); from assigning or dealing with property to which she has become entitled, pending a suit by her to enforce her equity to a settlement in respect of the same (*r*); or from

North Western and Great Western Railway Companies, (1896) 1 Q. B. 649; 65 L. J. Q. B. 511; *Bright* v. *River Plate Construction Co.*, (1900) 2 Ch. 835; 70 L. J. Ch. 59; *Freeman and Sons* v. *Chester Rural Council*, (1911) 1 K. B. 783, 791; 80 L. J. Q. B. 695; *Blackwell & Co.* v. *Derby Corporation*, (1911) 75 J. P. 129; *Bristol Corporation* v. *Aird*, (1913) A. C. 241; 82 L. J. K. B. 684. See *Hickman & Co.* v. *Roberts*, (1913) A. C. 229; 82 L. J. K. B. 678.

(*l*) *Lees and Barker* v. *Willans*, (1894) 2 Ch. 478; 63 L. J. Ch. 521.

(*m*) *Bright* v. *River Plate Construction Co.*, *supra*.

(*n*) *Pescod* v. *Pescod*, (1888) W. N. 2; 58 L. T. N. S. 76.

(*o*) *Green* v. *Green*, 5 Ha. 400 n.; 71 R. R. 151; *Wood* v. *Wood*, 19 W. R. 1049; *Symonds* v. *Hallett*, 24 C. D. 346; 53 L. J. Ch. 60.

(*p*) *Symonds* v. *Hallett*, *supra*; *Wood* v. *Wood*, 19 W. R. 1049; *Weldon* v. *De Bathe*, 14 Q. B. D. p. 343; 54 L. J. Q. B. 113; cf. *Gaynor* v. *Gaynor*, (1901) 1 I. R. 217.

(*q*) *Donnelly* v. *Donnelly*, 31 Sol. J. 45; *Gaynor* v. *Gaynor*, *supra*.

(*r*) *Roberts* v. *Roberts*, 2 Cox, 422; *Ellis* v. *Ellis*, 2 Coop. C. C. 234.

dealing with property to which she was entitled at the date when she went through the ceremony of marriage with the defendant, pending a suit instituted by her in the Divorce Court for declaration of nullity of such marriage (*s*). So also the Court will enforce by injunction legal and proper covenants in a separation deed (*t*).

A wife who has divorced her husband and obtained an order for alimony to be payable out of his then present income until further order is in the position of a judgment creditor; and it has been held that in such a case the wife may, in an action against the husband and the trustees of a settlement, under which the husband has a life interest, obtain an injunction to restrain the trustees from acting upon any consent given by the husband to the exercise of the power of advancement in favour of children contained in the settlement (*u*). So also, if an order has been made for the payment of alimony, the Court will restrain a husband from getting rid of his property or putting it out of his power (*x*). So also where an order had been made for payment by a husband of his wife's costs in divorce proceedings, the Court granted an injunction restraining the executors of a will from paying, and the husband from receiving a legacy (*y*). But the Court has no jurisdiction, where there is no subsisting order for alimony, to restrain a husband who is respondent in a matrimonial suit from removing his property out of the jurisdiction or mortgaging or disposing of it (*z*).

Injunctions against marrying infant wards of Court.

Where it appears that an infant ward is about to make a marriage without the consent of the Court, an injunction will

(*s*) *Sealey* v. *Gaston*, 13 W. R. 577.

(*t*) *Hamilton* v. *Hector*, 13 Eq. 511; 6 Ch. 701; 40 L. J. Ch. 692; *Besant* v. *Wood*, 12 C. D. 605; 48 L. J. Ch. 497; *Marshall* v. *Marshall*, 5 P. D. 19; 48 L. J. P. 49; *Aldridge* v. *Aldridge*, 13 P. D. 210, 214; 58 L. J. P. 8. See *Kennedy* v. *Kennedy*, (1907) P. p. 51; 76 L. J. P. p. 36.

(*u*) *Oliver* v. *Lowther*, 28 W. R. 381; 42 L. T. 47.

(*x*) *Sidney* v. *Sidney*, 17 L. T. N. S. 9; *Waterhouse* v. *Waterhouse*, (1893) P. 284; 62 L. J. P. 115; *Newton* v. *Newton*, (1896) P. 36; 65 L. J. P. 15; *Bullus* v. *Bullus*, (1910) 102 L. T. 399; 26 T. L. R. 330.

(*y*) *Bullus* v. *Bullus*, *supra*.

(*z*) *Newton* v. *Newton*, 11 P. D. 11; 55 L. J. P. 13; *Burmester* v. *Burmester*, (1913) P. 76, 79; 82 L. J. P. 55.

be granted not only to restrain the marriage, but also all communication with the infant, and all intercourse, either personal or by letter; and if the guardian is suspected of countenancing the intended marriage, he will be restrained from permitting the marriage or giving his consent without the leave of the Court (*a*). If the infant about to contract an improper marriage has no property, or is not a ward of Court, his parent may, by settling a small sum of money for his or her benefit, in order to give the Court jurisdiction, and bringing an action for the execution of the trusts of the settlement, obtain an injunction to restrain the other party with whom marriage is contemplated from marrying or having any communication with the infant (*b*). But after a person who has been a ward of Court has attained the age of twenty-one, there is no jurisdiction to restrain such person from marrying, or settling, or disposing of his or her property in any way desired (*c*).

Injunctions against parents with respect to custody and education of children.

The Court may also, on a proper case being made out, deprive a father in case of immorality, cruelty, or ill-treatment, of his legal right to the custody of his children (*d*). Children will not be removed from their father merely because he is poor, or unable to maintain them (*e*). Mere acts of harshness or severity of a father, or the fact that he has a somewhat passionate temper, are not sufficient ground for removing the children from his custody. To warrant the removal of children from the custody of their father, a case is generally required to be made out either of moral turpitude, or of cruelty, so as to render him unfit to have the management of them (*f*). The fact that a father is having immoral

(*a*) *Smith* v. *Smith*, 3 Atk. 307; *Pearce* v. *Crutchfield*, 14 Ves. 206; *Warter* v. *York*, 19 Ves. 454; *Norris* v. *Ormond*, W. N. (1883) 58.

(*b*) *Dawson* v. *Thompson*, 12 L. T. N. S. 178. See *Gynn* v. *Gilbard*, 1 Dr. & Sm. 357.

(*c*) *Bolton* v. *Bolton*, (1891) 3 Ch. 270; 60 L. J. Ch. 689.

(*d*) *Shelley* v. *Westbrooke*, Jac. 266 n.; 23 R. R. 47; *Anon.*, 2 Sim. N. S. 54, 69; *De Manneville* v *De Manneville*, 10 Ves. 52; 7 R. R. 340; *Hamilton* v. *Hector*, 6 Ch. p. 705; 40 L. J. Ch. 692; *Smart* v. *Smart*, (1892) A. C. 425; 61 L. J. P. C. 38; *Reg.* v. *Gyngall*, (1893) 2 Q. B. 232, 239; 62 L. J. Q. B. 559; *In re Newton*, (1896) 1 Ch. 740, 750; 65 L. J. Ch. 640.

(*e*) *Re Fynn*, 2 De G. & S. 457; 79 R. R. 284; *Re Curtis*, 28 L. J. Ch. 458.

(*f*) *Re Curtis*, *supra*; *Blake* v.

intercourse with a woman is not in itself a sufficient ground to induce the Court to deprive him of the custody of his child, where the child is not brought into contact with the woman, and no misconduct on the part of the father is shown with reference to the management and education of the child (*g*).

Guardianship of Infants Act, 1886.

Custody of infants.

The Guardianship of Infants Act, 1886, made great alterations in the old law in regard to the custody of infants. By sect. 2, upon the death of the father, the mother becomes the guardian, either alone or jointly with a guardian appointed by the father. By sect. 5 the Court may, upon the application of the mother of any infant, make such order as it may think fit regarding the custody of such infant, and the right of access of either parent, "having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father" (*h*); and by sect. 6 the Court may, in its discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting under the Act (*i*).

Under sect. 5 of the Act of 1886 the Court has, after taking into account the various considerations mentioned in that section, full jurisdiction to entirely override the common law rights of a father in relation to the custody of his infant children (*k*).

Welfare of the infant is the main consideration.

It is now well settled that in questions concerning the custody of infants, the main consideration to which regard will be had is the welfare of the child. As laid down by the Court of Appeal (*l*) in a case which raised the question of the

Wallscourt, 7 L. T. O. S. 545; *Hamilton* v. *Hector*, 13 Eq. 511; 6 Ch. 705; 40 L. J. Ch. 692; *Smart* v. *Smart*, (1892) A. C. 425, 432; 61 L. J. P. C. 38.

(*g*) *Ball* v. *Ball*, 2 Sim. 35; *In re Marsh*, L. R. 1 P. & D. 438.

(*h*) See *In re A and B* (*Infants*), (1897) 1 Ch. 786; 66 L. J. Ch. 592.

(*i*) See *In re McGrath*, (1893) 1 Ch. 143; 62 L. J. Ch. 208; *F.* v. *F.*, (1902) 1 Ch. 688; 71 L. J. Ch. 415; see also the Custody of Infants Act, 1891 (54 Vict. c. 3), s. 3, and the Children Act, 1908 (8 Edw. 7, c. 67), ss. 21—23.

(*k*) *In re A and B* (*Infants*), (1897) 1 Ch. 786; 66 L. J. Ch. 592.

(*l*) *In re McGrath*, (1893) 1 Ch. 143, 148; 62 L. J. Ch. 208; and see *Stourton* v. *Stourton*, 8 De G. M. & G. 760, 771; 26 L. J. Ch. 354, 357; *Reg.* v. *Gyngall*, (1893) 2

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custody of a penniless child under the care of a legal guardian who was able and willing to maintain and educate the child at his own expense, "The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

Education of infant.

So also, although, with reference to the religious education of an infant, the Court will as a rule have regard to and enforce the wishes of the father (*m*), nevertheless, the paramount consideration is always the welfare of the child; and accordingly, if a sufficient case is made out in the infant's interest, the Court may disregard the father's wishes with reference to the religious education, even though the father be still living (*n*).

Injunctions to restrain burial.

The Court has jurisdiction to restrain the incumbent of a parish from burying in the churchyard without the consent of the churchwardens or parishioners of the parish, the corpse of a person not being a parishioner of the parish (*o*). The Court will restrain the owners of a cemetery from using for burial any part of their ground within one hundred yards from a dwelling house without the consent of the owner, lessee, or occupier of the house if such ground has not been already used as or appropriated for a cemetery (*p*). But the

Q. B. 232, 243; 62 L. J. Q. B. 559; *F.* v. *F.*, (1902) 1 Ch. 688; 71 L. J. Ch. 415; *In re W.*, (1907) 2 Ch. pp. 566, 567; 77 L. J. Ch. p. 152; *Rex* v. *Walker*, (1912) 28 T. L. R. 342, compromised on appeal, p. 375 (custody of illegitimate child), and see also as to custody of an illegitimate child *Rex* v. *New*, (1904) 20 T. L. R. 583.

(*m*) *In re Scanlan*, 40 C. D. 200; 57 L. J. Ch. 718; *In re McGrath*, (1893) 1 Ch. p. 148; 62 L. J. Ch. p. 211; *In re W.*, (1907) 2 Ch. 566; 77 L. J. Ch. 152.

(*n*) *In re Newton*, (1896) 1 Ch. 740; 65 L. J. Ch. 640; and see *In re W.*, *supra*.

(*o*) *Att.-Gen.* v. *Strong*, 1 Set. 550.

(*p*) Burial Act, 1857 (18 & 19 Vict. c. 128), s. 9. See *Greenwood* v. *Wadsworth*, 16 Eq. 288; 43 L. J. Ch. 78; *Lord Cowley* v. *Byas*, 5 C. D. 945; *Wright* v. *Wallasey*

consent of the owner, lessee, or occupier of a dwelling-house to the user of land for burial within one hundred yards of his dwelling-house is not now required if the house was erected after any part of the ground has been used as or appropriated for a burial ground or cemetery (*q*).

Injunctions against petition to wind up.

The Court has jurisdiction to restrain by injunction the creditor of a solvent company, whose claim is disputed, from presenting a petition to wind up the company (*r*). Moreover, where a petition against a company is presented, ostensibly for a winding-up order, but in reality for another purpose, such as putting pressure on the company, the Court has an inherent jurisdiction to prevent such an abuse of process, and will do so (upon application being made to the Court in which the petition is pending) without requiring an action to be brought, by restraining the advertisement of the petition and staying all proceedings upon it (*s*).

Assumption a name.

An injunction will not be granted to restrain a person from assuming a name, the patronymic of a family, there being no property in a name except when it has been exclusively used in connection with a particular business (*t*). Nor will an injunction be granted to restrain the former wife of a peer who has obtained a divorce from him and subsequently married a commoner, from continuing to use the title she acquired by her first marriage (*u*). Nor will an injunction be granted to restrain a person from bearing any arms he pleases, pro-

Arms.

Local Board, 18 Q. B. D. 783; 56 L. J. Q. B. 259; *Godden* v. *Hythe Burial Board*, (1906) 2 Ch. 270; 75 L. J. Ch. 595, where the plaintiff's house was erected after the defendants had acquired the land for burial purposes.

(*q*) Burial Act, 1906 (6 Edw. 7, c. 44), s. 1; and see 2 Edw. 7, c. 8, s. 5, which provides that no crematoria shall be constructed within 200 yards of a dwelling house without the consent of the owner, lessee, or occupier.

(*r*) *Cadiz Waterworks Co.* v. *Barnett*, 19 Eq. 182; 44 L. J. Ch. 529; *Niger Merchants' Co.* v. *Capper*, 18 Ch. D. 557 n.; 25 W. R. 365; *Cercle Restaurant Castiglione Co.* v. *Lavey*, 18 C. D. 555; 50 L. J. Ch. 837; *New Travellers' Chambers, Limited* v. *Cheese & Green*, 70 L. T. 271.

(*s*) *In re A Company*, (1894) 2 Ch. 349; 63 L. J. Ch. 565; and see *In re Gold Hill Mines Co.*, 23 C. D. 210; 49 L. T. 66.

(*t*) *Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 430; 38 L. J. P. C. 35; *Cowley (Earl)* v. *Cowley (Countess)*, (1901) A. C. p. 460; 70 L. J. P. 89.

(*u*) *Cowley (Earl)* v. *Cowley Countess*, (1901) A. C. 450; 70 L. J. P. 83.

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vided he does not interfere with the rights of others or deceive them (*x*).

Name of house.

An injunction will not be granted (in the absence of fraudulent intent or the like) to restrain a man from adopting as the name or designation of his house or land a name for a long time used by a neighbour to designate his house or land (*y*).

Telegraphic address.

Nor would the Court grant an injunction to restrain a bank from registering at the Post Office as a telegraphic address an abbreviation used for many years for the same purpose by the plaintiffs who were carrying on the business of advertising agents, there being no fraud, but merely inconvenience to the plaintiffs (*z*).

Injunction against opening letters.

An injunction may be had to restrain a man from opening letters addressed to another (*a*). *Primâ facie* all letters must be taken to be intended for the person to whom they are addressed, but if the person to whom they are addressed is the secretary of a company, the company may open such letters as appear from some other indication than the mere address to be intended for them. Letters not bearing any such indications may not be opened by the company except in the presence of the person to whom they are addressed (*b*).

A man who has been dismissed by his employers has no right to give a notice to the Post Office, the effect of which would be to hand over to him letters, the greater part of which probably relate only to the business of his employers. In such a case the Court will, if necessary, grant a mandatory injunction compelling the defendant to withdraw his notice, the plaintiff being put on an undertaking only to open letters addressed to the defendant at certain specified times with liberty for the defendant to be present at the opening of them (*c*).

(*x*) *In re Croxon*, (1904) 1 Ch. p. 258; 73 L. J. Ch. p. 172.

(*y*) *Day* v. *Brownrigg*, 10 C. D. 306: 48 L. J. Ch. 173.

(*z*) *Street* v. *Union Bank of Spain*, 30 C. D. 156; 55 L. J. Ch. 31.

(*a*) *Scheil* v. *Brakell*, 11 W. R. 796; *Edyington* v. *Edyington*, 11 L. T. N. S. 299; *Stapylton* v. *Foreign Vineyard Association*, 12 W. R. 976.

(*b*) *Stapleton* v. *Foreign Vineyard Association*, 12 W. R. 976.

(*c*) *Hermann Loog* v. *Bean*, 26 C. D. 306; 53 L. J. Ch. 1128.

Repeated publication of apology.

The prosecutors, in a trade mark case, offered no evidence against the offender and he was acquitted, he giving a letter of apology with authority to the prosecutors to make such use of it as they might think necessary. The prosecutors published this letter by advertisements and continued to do so for nearly two months. It was held that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from continuing to publish the letter (*d*).

Injunctions to restrain publication of proceedings pending before courts of justice.

The Court has the power to prohibit the publication of proceedings which are pending in all cases where the interests of justice are likely to be injuriously affected by their publication (*e*). But it is in each case a matter for the discretion of the Court whether or not it will interfere. The Court will not restrain every report in the columns of a newspaper which may appear to be unfair in any respect (*f*). If, however, the case is one in which the Court feels it ought to interfere, it is no excuse that the publication may have been by defence, and in answer to similar publications by the other side, although it may excuse the party sought to be restrained from the costs of the motion for that purpose (*g*). In *Mackett* v. *Commissioners of Herne Bay* (*h*), the Court restrained a minister from preaching a sermon upon a subject having reference to a pending action, and also from issuing placards announcing his intention to preach such a sermon.

The misrepresentation by a party to an action, of the result of the proceedings, to the prejudice of his opponent, is a contempt of Court which will be restrained by injunction (*i*).

In a case where a petition was pending for the compulsory winding up of a company, it was held to be a contempt of Court to issue a circular to the shareholders of the company containing misrepresentations with intent to obtain a resolu-

(*d*) *Fisher & Co.* v. *Apollinaris Co.*, 10 Ch. 297; 44 L. J. Ch. 500. But see *Windhill Local Board of Health* v. *Vint*, 45 C. D. p. 359; 59 L. J. Ch. p. 612.

(*e*) *R.* v. *Clement*, 4 B. & Ald. 219; 23 R. R. 260.

(*f*) *Brook* v. *Evans*, 29 L. J. Ch. 616.

(*g*) *Coleman* v. *West Hartlepool Railway Co.*, 8 W. R. 734.

(*h*) 24 W. R. 845.

(*i*) *Gillette Safety Razor Co.* v. *Gamage & Co.*, (1907) 24 R. P. C. 3.

tion of the company for voluntary winding-up, and thereby mislead the Court as to the real view of the shareholders (*k*).

But where a shareholder applied on behalf of himself and the other shareholders of the Company for the removal of the liquidator in the voluntary winding up, and before the hearing of the application sent a circular to the other shareholders setting out his allegations against the liquidator, and asking for their support, the Court dismissed the liquidator's application for an injunction to restrain the issuing of the circular or the committal of the shareholder for contempt of Court, on the ground that the circular could not in any way interfere with, or prejudice, the due trial of the matter (*l*).

Proceedings *in camerâ*.

The general rule is that legal proceedings should be in public (*m*), but to this rule there are exceptions. Thus whenever it is reasonably clear that justice cannot be done unless the case is heard *in camerâ*, whether it be a patent action, or a case relating to a secret process, or a matter in Chancery relating to a ward of Court, or where a public hearing would disclose what it is the whole object of the action to keep concealed, then the Court, by reason of its inherent jurisdiction, has power to order that the case be heard *in camerâ*, and when the Court has so decided, it is a contempt of Court to attempt to publish an account of the proceedings (*n*).

Injunction against committing contempt of court.

It is competent for the Court, where a contempt is threatened (*o*), or has been committed, to take the more

(*k*) *Re Septimus Parsonage and Co., Ltd.*, (1901) 2 Ch 424; 70 L. J. Ch. 706.

(*l*) *In re New Gold Coast Exploration Co.*, (1901) 1 Ch. 860; 70 L. J. Ch. 355.

(*m*) *In re Martindale*, (1894) 3 Ch. p. 200; 64 L. J. Ch. 9. See *Scott* v. *Scott*, (1913) A. C. 417; 82 L. J. P. 74; *Moosbrugger* v. *Moosbrugger*, (1913) 29 T. L. R. 658.

(*n*) See *Ogle* v. *Brandling*, 2 R. & M. 688 (wards of Court); *Andrew* v. *Raeburn*, 9 Ch. 522; 31 L. T. 73 (publication of letters); *Mellor* v. *Thompson*, 31 C. D. 55; 55 L. J. Ch. 942 (confidential information); *Badische Anilin und Soda Fabrik* v. *Levinstein*, 24 C. D. 156; 52 L. J. Ch. 704; *Reddaway* v. *Flynn*, (1913) 30 R. P. C. p. 17 (secret process); *Re Martindale*, (1894) 3 Ch. 200, 201; 64 L. J. Ch. 9 (ward of Court); and *Scott* v. *Scott*, (1913) A. C. pp. 437, 438; 82 L. J. P. 83, where hearing *in camerâ* is discussed.

(*o*) *Kitcat* v. *Sharpe*, 52 L. J. Ch. 134; 31 W. R. 227.

lenient course of granting an injunction, instead of making an order for committal or sequestration (*p*).

Injunction against renewal of certificate by solicitor.

The Court has jurisdiction on a proper case being made out to restrain a solicitor who has not taken out his certificate for several years from renewing his certificate without leave of the Court (*q*).

Injunction against enforcing a rate.

If a good equitable case can be made to appear, the Court will grant an injunction to restrain a local Board from enforcing a rate until the opinion of the Court as to the validity of the rate has been taken, the plaintiff paying the amount of the rate into Court (*r*).

Injunction against pulling down a sign-board.

Where a man has made out his right to an easement to fix a sign-board on the house of another, the latter will be restrained by injunction from pulling down the sign-board (*s*).

Injunction against interference with receiver.

A receiver appointed by the Court is an officer of the Court, and any interference with his possession of the property of which he is receiver, without the leave of the Court, may be punished as a contempt of Court (*t*) or be restrained by injunction (*u*).

Person prejudiced by receiver's acts.

A person who is prejudiced by the proceedings of a receiver appointed by the Court should not bring an action to restrain the receiver from acting in derogation of his rights, but should apply for relief in the action in which the receiver was appointed (*x*).

Interference with receiver appointed by mortgagee.

Where a receiver had been appointed by a mortgagee under sect. 19 of the Conveyancing Act, 1881, the Court restrained

(*p*) *Plimpton* v. *Spiller*, 4 C. D. 286; *J. and P. Coats* v. *Chadwick*, (1894) 1 Ch. p. 349; 63 L. J. Ch. 328; *Gillette Safety Razor Co.* v. *Gamage & Co.*, (1907) 24 R. P. C. p. 6.

(*q*) *Re Whitehead*, 28 C. D. 614; 54 L. J. Ch. 796.

(*r*) *Ashworth* v. *Hebden Bridge Local Board*, 47 L. J. Ch. 195; 37 L. T. 496. See *ante*, p. 594.

(*s*) *Moody* v. *Steggles*, 12 C. D. 261; 48 L. J. Ch. 639.

(*t*) *Helmore* v. *Smith*, 35 C. D. 449; 56 L. J. Ch. 145.

(*u*) *Aston* v. *Heron*, 2 M. & K. 391; *Tink* v. *Rundle*, 10 Beav. 318; 76 R. R. 139; *Ames* v. *Trustees of Birkenhead Docks*, 20 Beav. 332; 24 L. J. Ch. 540; 109 R. R. 442; *Dixon* v. *Dixon*, (1904) 1 Ch. 611; 73 L. J. Ch. 103; *In re Maidstone Palace of Varieties Co.*, (1909) 2 Ch. 283, 286; 78 L. J. Ch. 739.

(*x*) *Searle* v. *Choate*, 25 C. D. 723; 53 L. J. Ch. 506. *In re Maidstone Palace of Varieties Co.*, *supra*.

the mortgagor from interfering with the receiver in his collection of the rents (*y*).

Injunction to restrain closing order.

In a case where a local authority served an owner of dwelling-houses with a closing order under sect. 17, sub-sect. 2 of the Housing and Town Planning, &c., Act, 1909, prohibiting the use of his houses until he had rendered them fit for human habitation, but the order did not contain a note informing the plaintiff of his right to appeal to the Local Government Board, the Court granted an injunction restraining the local authority from proceeding to enforce the order on the ground that the "note" was a material part of the statutory form, and that its omission invalidated the proceedings of the local authority (*z*).

Injunction against landlord entering deceased tenant's house.

Where a landlord on the death of his tenant intestate entered his house and seized his goods, the Court, on *ex parte* application of the sole next-of-kin before letters of administration had been obtained, granted an injunction restraining the landlord from entering the house and interfering with the deceased tenant's property (*a*).

Demise of room bounded in part by outside wall, *primâ facie* includes both sides of wall.

The demise of a room bounded in part by an outside wall *primâ facie* comprises both sides of the wall unless there be an exception or reservation in the context to exclude it. Accordingly, where a first floor of a building was demised, and the lessees covenanted to keep the inside of the demised premises in repair, the Court refused to restrain the lessees from attaching flower boxes to the outside of their windows (*b*); so also the Court under a similar demise restrained the lessor from affixing advertisements on the outside wall of the demised premises (*c*).

National Insurance Act, 1911.

An injunction will be granted to restrain an approved society under the National Insurance Act, 1911, from restricting the rights of its members to sickness benefit under the Act, *e.g.*, insisting on the certificate of a panel doctor on an application for sickness benefits (*d*).

(*y*) *Bayly* v. *Went*, 51 L. T. 664; (1884) W. N. 197. See *Woolston* v. *Ross*, (1906) 1 Ch. 788, 791; 69 L. J. Ch. 363.

(*z*) *Rayner* v. *Stepney Corporation*, (1911) 2 Ch. 312; 80 L. J. Ch. 678.

(*a*) *In the Goods of Cassidy*, (1904) 2 I. R. 427.

(*b*) *Hope Brothers, Ld* v. *Cowan*, (1913) 2 Ch. 312; 82 L. J. Ch. 439.

(*c*) *Goldfoot* v. *Welch*, (1913) W. N. 357.

(*d*) *Heard* v. *Pickthorne*, (1913) 3 K. B. 299; 108 L. T. 818.

CHAPTER XXII.

PRACTICE.

SECTION 1.—IN WHAT MANNER INJUNCTIONS ARE OBTAINED.

THE writ of injunction under the former procedure issued pursuant to order, but under the present procedure no writ of injunction is to issue. An injunction is by judgment or order, and such judgment or order has the effect which a writ of injunction previously had (*a*). An injunction will not in general be granted, except after a writ of summons has issued (*b*). In an urgent case, however, an injunction may be granted before a writ of summons has issued (*c*). In such a case the affidavit should be intituled in the contemplated action (*d*). So also where, on account of the offices of the Court being closed, the issuing of a writ of summons has been delayed, the Court may grant an injunction before a writ of summons has issued, upon the undertaking of the party applying to issue a writ of summons immediately (*e*). A plaintiff should endorse his writ with a claim for an injunction, when obtaining it is a substantial object of his action (*f*). But leave may be obtained to amend the endorsement by inserting a claim for an injunction (*g*). The nature of the injunction claimed should also appear from the endorsement on the writ (*h*).

Injunction as rule only after issue of writ.

(*a*) R. S. C. Ord. L. r. 11.

(*b*) *Savery* v. *Dyer*, Amb. 70; Mitf. Pl. 55. See *Carter* v. *Fey*, (1894) 2 Ch. 541; 63 L. J. Ch. 723.

(*c*) *Thorneloe* v. *Skoines*, 16 Eq. 126; 42 L. J. Ch. 788. See *Chanock* v. *Hertz*, 4 T. L. R. 331.

(*d*) See *Young* v. *Brassey*, 1 C. D. 277; 45 L. J. Ch. 142.

(*e*) *Carr* v. *Morice*, 16 Eq. 125; 42 L. J. Ch. 787; *Campana* v. *Webb*, 22 W. R. 622. See *Chanock* v. *Hertz*, *supra*.

(*f*) R. S. C. Ord. III.; *Colebourne* v. *Colebourne*, 1 C. D. 690; 45 L. J. Ch. 749.

(*g*) R. S. C. Ord. XXVIII. r. 1; *Colebourne* v. *Colebourne*, 1 C. D. 690; 45 L. J. Ch. 749.

(*h*) R. S. C., App. A., Pt. 3, s. 4;

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Service out of the jurisdiction.

A writ of summons, or notice of a writ, may be allowed by the Court to be served out of the jurisdiction, when an injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof (*i*). The Court may give leave to serve notice of motion with the writ out of the jurisdiction (*k*). To obtain leave for service out of the jurisdiction, the plaintiff must satisfy the Court that his claim for an injunction is made in good faith and that there is a probability that he will obtain an injunction. A mere claim for an injunction is not sufficient to justify service on a person resident out of the jurisdiction (*l*).

Injunction sometimes granted although not claimed by writ.

At the trial of the action an injunction will sometimes be granted, although not claimed upon the endorsement of the writ (*m*). So also after judgment, parties to the action, or persons who have come in under the decree, will be restrained from violating the spirit of or taking proceedings that are contrary to the decree, although an injunction be not claimed upon the writ of summons (*n*). The Court will also, under similar circumstances, interfere to prevent injury to property, either by the parties litigant or others. Thus, if after a decree to account, the mortgagor attempts to cut timber, the Court will enjoin him, though an injunction was not claimed (*o*)

Re Myers' Patent, 26 S. J. 371; *Carter* v. *Fey*, (1894) 2 Ch. p. 545; 63 L. J. Ch. p. 725.

(*i*) R. S. C. Ord. XI. r. 1 (*f*).

(*k*) See Ord. XI. r. 8a; *In re Bullen Smith*, 57 L. T. 924; *Overton* v. *Burn*, 74 L. T. 776; *Hersey* v. *Young*, (1894) W. N. 187.

(*l*) See *De Bernales* v. *New York Herald*, (1893) 2 Q. B. 97, n; 62 L. J. Q. B. 385; *Chemische Fabrik Sandez* v. *Badische Anilin Soda-Fabrik*, (1904) 90 L. T. 733; 20 T. L. R. 552; *Watson* v. *Daily Record Co.*, (1907) 1 K. B. 853; 76 L. J. K. B. 448; *Alexander & Co.* v. *Valentine & Co.*, (1908) 25 T. L. R. 29.

(*m*) *Reynell* v. *Sprye*, 1 De G. M. & G. 660; 21 L. J. Ch. 663, 664; 91 R. R. 228; *Bloomfield* v. *Eyre*, 8 B. 250, 259; 14 L. J. Ch. 260; 68 R. R. 87; *Goodman* v. *Kine*, 8 B. 379.

(*n*) *Casamajor* v. *Strode*, 1 Sim. & St. 381; *Grand Junction Canal Co.* v. *Dimes*, 17 Sim. 38; 18 L. J. Ch. 419.

(*o*) *Wright* v. *Atkyns*, 1 V. & B. 313; 13 R. R. 199.

Parties.

The application for an injunction must be made by a party having sufficient interest (*p*). A man who has no personal interest in the matter cannot move for an injunction, even though he may have been made a party to the action (*q*). If the act complained of affects the public interest, the action should be brought by the Attorney-General at the instance of a relator. Private persons may sue alone, if their proprietary rights are affected or if they have suffered special damage from the wrongful act (*r*).

Claim of right to do act.

Where a party wrongfully claims a right to do a thing, even though he says he has no present intention to do it, there is a ground for making him a party to an action for an injunction to restrain him from doing it (*s*). A man who has assigned or disposed of his interest in the subject-matter should not be made a party to the action (*t*). But the parting by a defendant with his interest after the bringing of the action does not disentitle the plaintiff to an injunction (*u*).

Absence of parties.

Where there is a case for an injunction, and the injunction will operate for the benefit of parties not before the Court, the absence of those parties will not prevent the Court from interfering. It is enough that the property sought to be protected is in danger (*x*). In cases of injunction the Court frequently acts for parties in their absence (*y*) ; but where the injunction would injuriously affect the rights of persons not before

(*p*) *Wynne* v. *Lord Newborough*, 1 Ves. 164; *Leake* v. *Beckett*, 1 Y. & J. 339; 30 R. R. 794.

(*q*) *Hunter* v. *Nockalds*, 15 L. J. Ch. 320.

(*r*) *Soltau* v. *De Held*, 2 Sim. N. S. 133; 21 L. J. Ch. 153; 89 R. R. 245. See *ante*, pp. 111, 150; and see also *Att.-Gen.* v. *Garner*, (1907) 2 K. B. 480, 487; 76 L. J. K. B. 965; *Att.-Gen.* v. *Pontypridd Waterworks Co.*, (1908) 1 Ch. 388, 398; 77 L. J. Ch. 237.

(*s*) *Tipping* v. *Eckersley*, 2 K. & J. p. 270; *Hext* v. *Gill*, 7 Ch. 699, 711; 41 L. J. Ch. 761; *Shafto* v. *Bolckow & Co.*, 34 C. D. 725, 728; 35 W. R. 562; *Leckhampton Quarries Co.* v. *Ballinger and Cheltenham Rural District Council*, (1904) 20 T. L. R. p. 561 (affd. on appeal on question of costs, 21 T. L. R. 632); *Dickens* v. *National Telephone Co.*, (1911) 75 J. P. 557; *Thornhill* v. *Weeks*, (1913) 1 Ch. 438, 444; 82 L. J. Ch. 299.

(*t*) *Hawkins* v. *Gardiner*, 1 W. R. 345; *Clements* v. *Welles*, 1 Eq. 200. Cf. *Evans* v. *Davies*, 10 C. D. 747.

(*u*) *Bird* v. *Lake*, 1 H. & M. p. 121.

(*x*) *Const* v. *Harris*, T. & R. 514; 24 R. R. 108; *Evans* v. *Coventry*, 5 De G. M. & G. 916; *Hamp* v. *Robinson*, 3 De G. J. & S. p. 109.

(*y*) *Canst* v. *Harris*, T. & R. p.

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the Court, the Court will not ordinarily and without special necessity interfere (*z*).

An injunction —when extended to persons not parties to action.

An injunction will not in general be granted except the party against whom it is claimed is a party to the action (*a*). There are, however, exceptions to the rule. A man, for example, who has purchased under a decree will be restrained from acting contrary to the spirit of the decree, although not a party to the action (*b*). So also a tenant holding under a receiver will be restrained on motion, though not a party to the action (*c*). The defendant's attornies, agents, servants, and workmen may be enjoined, although the statement of claim and notice of motion may only ask for an injunction against the defendant (*d*), but the injunction will not be extended to the defendant's tenants (*e*). As to punishing for contempt of Court persons, not parties to the action, who aid in committing a breach of the injunction, see later (*f*).

Motion for an injunction.

Where an injunction forms a substantial part of the relief claimed in the action, the usual course is to move for an interlocutory injunction until the action is disposed of. Notice of motion may be served at any time after appearance has been entered or (*g*) after the time limited for entering an appearance has expired and the defendant has made default in appearing; or, by leave of the Court or a judge to be obtained *ex parte*, notice of motion may be served with the writ, or after service of the writ and before the time limited for

514; 24 R. R. 108; *Evans* v. *Coventry*, 5 De G. M. & G. 911.

(*z*) *Hartlepool Gas and Water Co.* v. *West Hartlepool Harbour and Railway Co.*, 12 L. T. N. S. 366. See *M'Beath* v. *Ravenscroft*, 8 L. J. (N. S.) Ch. 208. See *Metropolitan District Railway Co.* v. *Earls Court Co.*, (1911) 55 S. J. 807.

(*a*) *Iveson* v. *Harris*, 7 Ves. 256. See *Brydges* v. *Brydges and Wood*, (1909) P. p. 191; 78 L. J. P. p. 100; *Metropolitan District Railway Co.* v. *Earls Court Co.*, (1911) 55 S. J. 807; *Ranson* v. *Platt*, (1911) 1 K. B. p. 307; 80 L. J. K. B. p. 1146.

(*b*) *Casamajor* v. *Strode*, 1 Sim. & St. 381.

(*c*) *Walton* v. *Johnson*, 15 Sim. 352; 74 R. R. 99.

(*d*) *Seaward* v. *Paterson*, (1897) 1 Ch. p. 551; 66 L. J. Ch. 269; *Brydges* v. *Brydges*, (1909) P. p. 191; 78 L. J. P. 100; *Hubbard* v. *Woodfield*, (1913) 57 S. J. 729.

(*e*) *Hodson* v. *Coppard*, 29 Beav. 4; *Metropolitan District Railway Co.* v. *Earls Court Co.*, (1911) 55 S. J. 807 (sub-lessee).

(*f*) *Post*, pp. 691, 692.

(*g*) R. S. C. Ord. LII. r. 8.

Short notice.

appearance (*h*). In such cases the notice must state that it is by leave (*i*); and where a party obtains leave to serve *short* notice of motion (*k*) the notice must expressly state that such leave has been obtained (*l*).

Who may apply.

By R. S. C. Ord. L. r. 6, an application for an injunction may be made to the Court or a judge by any party. If the application be made by the plaintiff, it may be either *ex parte* or with notice; if by any other party, then on notice to the plaintiff, and at any time after appearance of the party making the application.

Application by defendant.

Under this rule, a defendant may before judgment apply for an injunction or a receiver; and he may do so, notwithstanding that the plaintiff has already served notice of motion for the like purpose (*m*). A defendant may apply for an injunction against the plaintiff without putting in a defence and counterclaim, or issuing a writ in a cross-action, *provided that* the relief in respect of which the injunction is claimed is incident to, or arises out of, the plaintiff's cause of action (*n*). Accordingly in an action in which both the plaintiff and the defendant relied, from different points of view, *upon the same agreement*, it was held that the defendant was entitled to apply for an injunction as soon as he had entered appearance in the action (*o*).

Service of notice of motion.

A plaintiff's notice of motion should be served upon the defendant. If there are several defendants, but the motion only concerns one of them, he alone should be served. If all the defendants are interested in the motion, all should be served (*p*).

The notice is served either personally on the party, or on his solicitor if he has appeared by a solicitor; and if it is made out to the satisfaction of the Court or a judge that the

(*h*) R. S. C. Ord. LII. r. 9.

(*i*) *Chambers* v. *Toynbee*, 12 W. R. 1100.

(*k*) *I.e.*, less than two clear days, Ord. LII. r. 5.

(*l*) *Dawson* v. *Beeson*, 22 C. D. 504; 52 L. J. Ch. 563.

(*m*) *Sargant* v. *Read*, 1 C. D. 600; 45 L. J. Ch. 206.

(*n*) *Carter* v. *Fey*, (1894) 2 Ch. 541; 63 L. J. Ch. 723; *Collison* v. *Warren*, (1901) 1 Ch. 812; 70 L. J. Ch. 382.

(*o*) *Collison* v. *Warren*, (1901) 1 Ch. 812; 70 L. J. Ch. 382.

(*p*) See *Service* v. *Castenada*, 9 Jur. 367.

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usual service cannot be effected, an order will be made for substituted service or for the substitution of notice for service (*q*).

Where a defendant has not entered an appearance, or having appeared has omitted to give an address for service as required by the rules, a notice of motion may be served on such defendant by filing the same with the proper officer (*r*).

If on the hearing of a motion or other application the Court or a judge is of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or judge may either dismiss the motion or application or adjourn the hearing thereof, in order that such notice may be given upon such terms, if any, as the Court or judge may think fit to impose (*s*).

Injunctions may be applied for during vacation.

An injunction may be applied for at any stage of the proceedings (*t*), and as well in vacation as in term, and whether the Court is sitting or not (*u*). But it is not the practice in the Chancery Division to grant an injunction in chambers when the Courts are sitting (*x*).

Injunctions *ex parte*.

No motion should be made without previous notice to the parties affected thereby. But the Court or a judge may, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, make an order for an injunction *ex parte* (*y*). In very pressing cases an injunction may be applied for *ex parte* before service of the writ of summons (*z*), and even before issuing the writ (*a*).

In a case in which application for an injunction *ex parte*

(*q*) R. S. C. Ord. LXVII. r. 6.

(*r*) R. S. C. Ord. LXVII. r. 4.

(*s*) R. S. C. Ord. LII. r. 6.

(*t*) *Bacon* v. *Jones*, 4 M. & C. 433, 436.

(*u*) *Lane* v. *Barton*, 1 Ph. 363; 13 L. J. Ch. 25; *Chappell* v. *Davidson*, 2 K. & J. 125; 110 R. R. 134.

(*x*) *English* v. *Vestry of Camberwell*, (1875) W. N. 256. Injunctions are frequently granted in Chambers in the King's Bench Division.

(*y*) R. S. C. Ord. LII. r. 3.

(*z*) *Colebourne* v. *Colebourne*, 1 C. D. 690; 45 L. J. Ch. 749; *Brand* v. *Mitson*, 45 L. J. P. 41; 24 W. R. 524.

(*a*) See *ante*, p. 643.

was made after the closing of the office for issuing the writ, the injunction was granted upon the applicant filing the writ by handing it to the Registrar who was in Court, and the affidavit was allowed to be filed in the same way. The injunction was to extend over the following Monday when motions were to be continued (*b*).

If an *ex parte* injunction is applied for against a defendant who is out of the jurisdiction, and the Court considers that it is a proper case for an *ex parte* injunction, the order which gives leave to serve the defendant with a writ of summons may also direct that the injunction do issue from and after the issuing of the writ (*c*).

If, upon an application *ex parte*, the Court thinks that the case is not so urgent as to require its immediate interference, it will order notice of the application to be served on the defendant (*d*).

If the defendant has appeared, he must, as a general rule, be served (*e*). A defendant who has had notice of motion for an injunction which he is willing and ready to meet ought not to have that injunction issued against him *ex parte*, and if from other engagements of counsel or the pressure of other business on the Court the plaintiff cannot bring on his motion, the inconvenience of this should fall on him, not on the defendant, who would be punished as a wrong-doer without the opportunity of being heard (*f*).

In cases of extreme urgency the Court may grant an injunction *ex parte* even after appearance (*g*). The affidavit in support of the application should, however, state the fact of appearance; otherwise it is irregular (*h*).

(*b*) *Chanock* v. *Hertz*, 4 T. L. R. 331.

(*c*) *Young* v. *Brassey*, 1 C. D. 277; 45 L. J. Ch. 142.

(*d*) See *Lord Byron* v. *Johnston*, 2 Mer. 29; 16 R. R. 135.

(*e*) *Collard* v. *Cooper*, 6 Madd. 190; *Perry* v. *Weller*, 3 Russ. 519; *Langham* v. *Great Northern Railway Co.*, 1 De G. & S. 497; 16 L. J. Ch. 437; 75 R. R. 174.

(*f*) *Graham* v. *Campbell*, 7 C. D. 470, 493; 47 L. J. Ch. 593.

(*g*) *Allard* v. *Jones*, 15 Ves. 605; *Harrison* v. *Cockerell*, 3 Mer. 1; *Petley* v. *Eastern Counties Railway Co.*, 8 Sim. 483; 8 L. J. Ch. 209; *Acraman* v. *Bristol Dock Co.*, 1 R. & M. 321; *Bell* v. *Hull and Selby Railway Co.*, 1 Ra. Ca. 623.

(*h*) *Harrison* v. *Cockerell*, 3 Mer. 1; *Randall* v. *Commercial Railway*

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Form of notice.

A notice of motion must be properly entitled in the cause in which it is made (*i*), and should state on whose behalf the motion is to be made. If notice of motion be given in an information, it must be on behalf of the Attorney-General, and not on behalf of the relator (*k*).

Service.

The notice of motion must state the day on which the motion is to be made. Unless the Court give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion; provided that in applications to answer the matters in an affidavit or to strike off the rolls, the notice must be served not less than ten clear days before the time fixed by the notice for making the motion (*l*). In the computation of the two clear days required on an ordinary notice of motion, Sundays, Christmas Day, and Good Friday are not to be reckoned (*m*).

If a proper case can be made out, leave may be had to serve short notice of motion. The leave must be stated in the notice (*n*). A notice of motion is not bad by reason of its being given for a day not in the sittings (*o*). In a case where there has been irregularity in obtaining leave to serve, and in serving short notice of motion, the Court may, nevertheless, if the party served has not been injured by the irregularity, exercise its discretion, under R. S. C. Ord. LXX. r. 1, and disregard the irregularity and hear the motion on its merits (*p*).

Costs.

The notice should state clearly the nature of the order asked

Co., 8 L. J. Ch. N. S. 252, 2 Coop. C. C. 169 n.; *Sutton* v. *Mumford*, ib. 171 n.; *Mexican Company of London* v. *Maldonado*, (1890) W. N. 8.

(*i*) *Rowlatt* v. *Cattell*, 2 Ha. 186.

(*k*) *Att.-Gen.* v. *Wright*, 3 Beav. 447; 10 L. J. Ch. 234.

(*l*) R. S. C. Ord. LII. r. 5.

(*m*) R. S. C. Ord. LXIV. r. 2.

(*n*) *Harris* v. *Lewis*, 8 Jur. 1063; *Dawson* v. *Beeson*, 22 C. D. 505; 52 L. J. Ch. 563. Leave to serve short notice of motion cannot, in vacation any more than during the sittings, be given by a master in the Chancery Division, but must be given by the judge in person. *Conacher* v. *Conacher*, 29 W. R. 230; (1881) W. N. 2.

(*o*) *In re Coulton*, 34 C. D. 22; 56 L. J. Ch. 312; *Williams* v. *Bouville*, 17 Q. B. D. 180.

(*p*) *Dawson* v. *Beeson*, 22 C. D. 505; 52 L. J. Ch. 563.

for (*q*). Costs may be given though not asked for by the notice (*r*), provided that the respondent appears upon the hearing of the motion (*s*).

Time for making motions.

An *ex parte* application for an injunction may be made at any time according to the urgency of the case. If the motion be upon notice, it must be made upon one of the days appropriated for the hearing of motions. Every day in Term is, strictly speaking, a motion day; but it is not the practice of the Court to hear motions except on seal days. If a man desires that a motion should be heard on a day not appropriated to the hearing of motions, he must obtain leave of the Court, and then give notice to the other party (*t*).

Affidavits.

Every application for an injunction must be supported by affidavits, so as to show that on the face of the evidence the application is well founded. If the application be *ex parte*, the affidavits must fully and fairly state the case within the knowledge of the plaintiff, so that the Court may see that *primâ facie* the thing is fair in the aspect in which it is presented to the Court. There must be no concealment or misrepresentation, but all the facts must be brought before the Court which are material to be brought forward (*u*).

Discharging an *ex parte* injunction.

The terms upon which an *ex parte* injunction is granted must be strictly complied with. Where an *ex parte* order was made upon condition that the writ was amended by adding a party who would give the usual undertaking, and this was not done until the opposite party had moved to discharge the order, the Court dissolved the *ex parte* injunction (*x*). If upon the hearing of a motion for an injunction, or to continue

(*q*) *Brown* v. *Robertson*, 2 Ph. 173.

(*r*) *Clark* v. *Jaques*, 11 Beav. 623; *Butler* v. *Gardener*, 12 Beav. 525.

(*s*) *Pratt* v. *Walker*, 19 Beav. 261; 105 R. R. 133; but see the Judicature Act, 1890, s. 5.

(*t*) *Chaffers* v. *Baker*, 2 W. R. 546; 5 De G. M. & G. 482; 104 R. R. 173.

(*u*) *Att.-Gen.* v. *Mayor, &c., of Liverpool*, 1 M. & C. 210; 43 R. R. 176; *Castelli* v. *Cook*, 7 Ha. p. 94; 18 L. J. Ch. 148; *Dalglish* v. *Jarvie*, 2 Mac. & G. p. 243; 20 L. J. Ch. 475; 86 R. R. 83; *Schmitten* v. *Faulks*, (1893) W. N. 64; *Boyce* v. *Gill*, 64 L. T. 824.

(*x*) *Spanish General Agency Corporation* v. *Spanish Corporation, Ltd.*, 63 L. T. 161; (1890) W. N. 158.

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an *interim* order for an injunction already obtained *ex parte*, it appears that the *interim* order was irregularly obtained in consequence of a suppression of facts, the Court may discharge the *ex parte* order without any cross notice of motion for that purpose (*y*).

What the affidavits must show.

The affidavits in support of an *ex parte* injunction should always state the precise time at which the plaintiff or those acting for him became aware of the threatened injury (*z*). They must show either that notice to the defendant would be mischievous, or that the matter is so urgent that the injury threatened would, if notice were served on the defendant, be experienced before the injunction could be obtained. If the affidavits fall short of this, the motion will be ordered to stand over and notice to be served on the defendant (*a*).

By whom made.

The main affidavit is usually made by the plaintiff himself (*b*), but it may be made by any person acquainted with the facts (*c*). If, however, there is no affidavit by the plaintiff personally, and no sufficient reason given why there should not be such affidavit, the Court may on that ground refuse the motion (*d*). The affidavits should not be sworn until after the writ of summons has issued (*e*). No matter what the merits might be, an injunction founded on affidavits sworn before the filing of the bill could not under the old practice stand (*f*). But under the new practice upon an undertaking by plaintiff to have the affidavit resworn and filed, an *interim* injunction extending over the next motion day was granted in an action where the affidavit in support of the application had been sworn two days before the issue of the writ (*g*). Moreover, an affidavit may be allowed to be used in

Affidavits should not be sworn till after writ issued.

(*y*) *Boyce* v. *Gill*, 64 L. T. 824; (1891) W. N. 108.

(*z*) *Calvert* v. *Grey*, 2 Coop. C. C 171 n.

(*a*) See 1 L. J. (O. S.) Ch. pp. 3, 4.

(*b*) *Mollett* v. *Enequist*, 25 Beav. 609; 119 R. R. 569.

(*c*) *Kenworthy* v. *Accanor*, 3 Madd. 550; *Lord Byron* v. *Johnstone*, 2 Mer. 29; 16 R. R. 135; *Hamilton* v. *Board*, 1 N. R. 379.

(*d*) See *Lord Byron* v. *Johnstone*, 2 Mer. 29; 16 R. R. 135: *Spalding* v. *Keely*, 7 Sim. 377; *Scotson* v. *Gaury*, 1 Ha. 99; 11 L. J. Ch. 98.

(*e*) *Francome* v. *Francome*, 11 Jur. N. S. 123; 11 L. T. 757; *Fennall* v. *Brown*, 18 Jur. 1051.

(*f*) *Williams* v. *Davies*, 2 Coop. C. C. 172 n.

(*g*) *Green* v. *Prior*, (1886) W. N. 50.

an intended action in which the writ has not yet been issued (*h*).

Title of affidavits.

An affidavit must be intituled in the cause or matter in which it is sworn (*i*). It is, however, sufficient if it was correctly intituled when it was sworn, although the title of the cause may have been subsequently altered by amendment (*k*).

Form of affidavits.

All affidavits are to be drawn up in the first person (*l*).

Statements based on information and belief—when admissible.

Affidavits are to be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions in which statements as to belief, with the grounds thereof, may be admitted (*m*). The grounds of the deponent's belief must be stated so as to show that he has some reasonable and proper cause for making the statement, and has not sworn merely to raise an issue. Accordingly, an affidavit stating information and belief, and not stating the source of such information or belief, is irregular and inadmissible as evidence, whether on an interlocutory or on a final application; and a party or his solicitor attempting to use such an affidavit will do so at his peril as to costs (*n*).

Hearsay evidence is admissible on interlocutory applications as putting the opposite party to answer it, and if not expressly denied will generally be assumed for the purposes of the application to be in accordance with the facts (*o*).

Affidavits must be filed.

An affidavit cannot (except by leave of the Court or a judge) be used unless it is stamped with a proper filing stamp and has been duly filed. An office copy of the affidavit may in all

(*h*) *Young* v. *Brassey*, 1 C. D. 277; 45 L. J. Ch. 142; see *ante*, p. 643.

(*i*) R. S. C. Ord. XXXVIII. r. 2. But see *Blamey* v. *Blamey*, (1902) W. N. 138.

(*k*) *Hawes* v. *Bamford*, 9 Sim. 653.

(*l*) R. S. C. Ord. XXXVIII. r. 7. But as to affidavits sworn abroad, see *Blamey* v. *Blamey*, (1902) W. N. 138.

(*m*) R. S. C. Ord. XXXVIII. r. 3.

(*n*) *In re Young Manufacturing Co.*, (1900) 2 Ch. 753; 69 L. J. Ch. 868; and see *In re Anthony Birrell Pearce & Co.*, (1899) 2 Ch. 50; 68 L. J. Ch. 444.

(*o*) *Bird* v. *Lake*, 1 H. & M. 118; 8 L. T. 632. But see *Stamps* v. *Birmingham, Wolverhampton and Stour Valley Railway Co.*, 7 Ha. 251, 255; *In re Anthony Birrell Pearce & Co.*, (1899) 2 Ch. 50; 68 L. J. Ch. 444.

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cases be used, the original affidavit having been previously filed and the copy duly authenticated with the seal of the office (*p*). The office copy should be in Court at the time of making the motion (*q*). In pressing cases, however, where there is not time to get the affidavit filed before the injunction is applied for, the Court will grant an injunction upon an undertaking to file the affidavit (*r*). Sometimes, in vacation, the Court has taken the affidavits into its custody and acted upon them as if they had been filed (*s*).

Office copies.

An affidavit used on a motion, but not filed until afterwards, may be entered in the order as read, even though the fact of its not having been filed has not been brought to the notice of the Court, provided that it does not interfere with the date of the order, as where the filing is on the same day (*t*).

Time of filing affidavits.

Affidavits to be used on motions may be filed up to the last moment before the hearing (*u*). But the Court will not allow a party to gain an advantage from filing affidavits at the last moment (*x*); but will in such a case direct the motion to stand over to enable the defendant to answer the affidavits (*y*).

Except by leave of the Court or a judge, no order made *ex parte* in Court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion (*z*).

Delivery of copies of affidavits.

In the case of an *ex parte* application for an injunction, the party making the application must deliver copies of the affidavits upon which it was granted upon payment of the

(*p*) R. S. C. Ord. XXXVIII. r. 15.

(*q*) *Jackson* v. *Cassidy*, 10 Sim. 326; 10 L. J. Ch. 356; *Elsey* v. *Adams*, 4 Giff. 398.

(*r*) *Nieman* v. *Harris*, (1870) W. N. 6.

(*s*) *Att.-Gen.* v. *Lewis*, 8 Beav. 179; *Carr* v. *Morice*, 16 Eq. 125; 42 L. J. Ch. 787.

(*t*) *In re King & Co.'s Trade Mark*, (1892) 2 Ch. 462; 62 L. J. Ch. 153.

(*u*) *Ex parte Leicester*, 6 Ves. p. [illegible]; *Munro* v. *Wivenhoe, &c., Railway Co.*, 4 De G. J. & S. p. 726; 12 L. T. 562.

(*x*) *Carew* v. *Yates*, 1 W. R. 11.

(*y*) Ib.; see *Besemeres* v. *Besemeres*, Kay, App. 17; 23 L. J. Ch. 197; 101 R. R. 850.

(*z*) R. S. C. Ord. XXXVIII. r. 19.

proper charges, immediately upon the receipt of a written request by the party requesting such copies, and his undertaking to pay the proper charges, or within such time as may be specified in such request, or may have been directed by the Court or a judge (*a*).

Evidence after motion opened.

After the motion is opened no new evidence can be offered except with the leave of the Court (*b*). The Court may, however, admit affidavits after the case is opened, if a failure of justice is likely to occur by reason of their rejection or if great inconvenience would ensue (*c*). The Court may take notice of matters given in evidence in previous proceedings in the cause and may refer to notes made by the Court on such occasions (*d*).

Upon appeal from an order granting or refusing an interlocutory injunction, fresh evidence may be adduced in support of or to discharge the injunction (*e*). The rule that no new evidence can be adduced on a motion after it is opened extends to the case of documents which it is proposed to verify *viva voce* by the attesting witness (*f*).

Hearing of motion.

If on the hearing of a motion the Court or a judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or a judge may either dismiss the motion or adjourn the hearing thereof in order that such notice may be given upon such terms, if any, as the Court or judge may think fit to impose (*g*).

Whether or not the Court will grant an application for an interlocutory injunction depends on the merits as collected from the affidavits. If a sufficient *primâ facie* case be made out, the Court will consider the case sufficiently proved, unless

(*a*) R. S. C. Ord. LXVI. r. 7 (j).

(*b*) *Smith* v. *Swansea Dock Co.*, 9 Ha. App. 20 n.; *Bird* v. *Lake*, 1 H. & M. 118; 8 L. T. 632.

(*c*) *East Lancashire Railway Co.* v. Hattersley, 8 Ha. p. 86; 85 R. R. 215; *Anderton* v. *Yates*, 15 Jur. 633; *Munro* v. *Wivenhoe, &c., Railway Co.*, 4 De G. J. & S. 726; 12 L. T. 562.

(*d*) *Lister* v. *Leather*, 3 Jur. N. S. 433; 5 W. R. 550.

(*e*) *Pole* v. *Joel*, 2 De G. & J. 285; 119 R. R. 133; and see *Const* v. *Barr*, 2 Russ. 163; and see also R. S. C. Ord. LVIII. r. 4.

(*f*) *Bird* v. *Lake*, 1 H. & M. 111; 8 L. T. 632.

(*g*) R. S. C. Ord. LII. r. 6.

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the defendant [illegible] an affidavit denying it (*h*). The affidavit must traverse [illegible] the facts on which the plaintiff's equity depends. A mere general denial [illegible] sufficient (*i*). If the affidavits of the plaintiff and the defendant are altogether conflicting (*k*), or if the balance of evidence is in favour of the defendant, the motion may be dismissed or ordered to stand over. The Court or a judge may on the application of either party order the attendance for examination of the person making the affidavit (*l*).

But the Court has a discretionary power to receive such evidence as may be offered at the time of application, and as may appear necessary to meet the [illegible]. The Court will not allow a motion to [illegible] all witnesses to be examined if it appears that application is made for the purpose of causing delay only, and that the evidence is sufficient to enable it to act satisfactorily with the motion (*m*).

Case made out must correspond with allegations of statement of claim.

If a statement of claim is delivered, the case made out by the affidavits on the motion must correspond with the allegations in the statement of claim (*o*). If a man brings forward and relies upon a given case, the Court will allow him [illegible] he should fail in that case, to [illegible] another case which he might have framed his case so as to show a [illegible] asked (*p*). A man who complains of [illegible] peculiar and special kind [illegible] be allowed [illegible] evidence of another injury of [illegible] kind (*q*). An injunction is only granted on a

(*h*) [illegible] J. (O. S.) [illegible] L. J. Ch. [illegible] R. [illegible] Coll. 51 [illegible] *De Tastet* v. *Borden*, Jac. 51 [illegible] *M'Curdy* v. *Noak*, 17 L. J. Ch. 165.

(*i*) R. S. C. Ord. XXXVIII. r. 1.

(*k*) *Normanville* v. *Stanning*, 10 [illegible] pp. 20.

(*l*) *Mayer* v. *Spence*, 1 J. & H. 87.

(*m*) *Burton* v. *Blakeman*, [illegible] Jur. 1062.

(*o*) *Whitworth* v. *Gaugain*, Cr. & Ph. 325; 10 L. J. Ch. 317; *Castelli* v. *Cook*, 7 Ha. 89; 18 L. J. Ch. p. 149.

(*p*) *Hertz* v. *Union Bank of London*, 1 Jur. (N. S.) 127; 3 W. R. 49; and see *Att.-Gen* v. *Grocers' Co.*, 1 Keen, 506; *Jones* v. *Latimer*, 1 Jur. 980; *Castelli* v. *Cook*, 7 Ha. 89.

specific case. The Court never grants injunctions on general complaints (*r*).

Interim order.

Instead of issuing an injunction in the first instance the Court will often grant an *interim* order in the nature of an injunction, by which the defendant is restrained until after a particular day named. The usual practice is to extend the order over the next motion day, in order that the plaintiff may serve, by leave of the Court, the defendant with notice of motion for an injunction for that day. There is, however, no fixed rule on the subject. If it appear that the defendant would be oppressed by extending the order over the whole of the next motion day, the Court will either name a day short of that day, giving the plaintiff leave to serve the defendant with notice of motion for an injunction for that day; or else the Court will extend the order over the next motion day, but give the defendant leave to move sooner to discharge the order on notice, with liberty to the plaintiff to move simultaneously for an injunction (*s*).

In many respects there is a convenience in proceeding by *interim* order instead of granting an injunction. Among other conveniences the defendant is not put to the necessity of coming to the Court to discharge the order (*t*). Where an *interim* order is granted over the next motion day or until further order, it signifies that the injunction may be dissolved before that day. It does not mean that the injunction is to go on after that day or until further order, but that it is to stop earlier if the Court shall order (*u*). *Interim* orders are generally granted upon *ex parte* application, but they may be granted where the motion is upon notice. Where the application is *ex parte* it is necessary that the Court should be informed of all material facts (*x*).

(*r*) *Hertz* v. *Union Bank of London*, *supra*; *Burdett* v. *Hay*, 4 De G. J. & S. 41; 33 L. J. Ch. 41; *Munro* v. *Wivenhoe, etc., Railway Co.*, 4 De G. J. & S. 723; 13 W. R. 880.

(*s*) *Fraser* v. *Whalley*, 2 H. & M. 10. See, as to form of order, 1 Set. 507.

(*t*) *Fuller* v. *Taylor*, 32 L. J. Ch. 376.

(*u*) *Bolton* v. *London Board*, 7 C. L. R. 461.

(*x*) See *ante*, *Fuller* v. *Taylor*, 376.

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Where an *interim* order is sought, there should be no delay in making the application. If there has been delay, the Court will not grant the application, but may give the plaintiff leave to serve short notice of motion for a day fixed, notwithstanding appearance not entered (*y*).

Where an *interim* order has been obtained, and simultaneous applications are made on the part of the plaintiff for an injunction in the terms of the order, and on the part of the defendant to discharge the order, the plaintiff has a right to begin (*z*).

On the hearing of the motion the plaintiff is usually satisfied if the defendant gives an undertaking in the terms of the notice of motion, the plaintiff on his part giving the usual undertaking in damages (*a*).

Saving a motion.

The motion, if not brought on upon the day for which notice has been given, should be saved; a motion may be saved by the agreement of the parties without the leave of the Court (*b*). But a motion by special notice can only be saved by motion or by leave of the Court (*c*). A motion which is neither brought on nor saved will be treated as abandoned (*d*), and in such case the respondent may apply (not later than the next seal day) for the costs of the motion (*e*). A motion may be saved at any time before the Court rises, although the motions may have been finished (*f*).

Order made on affidavit of service, if defendant does not appear.

Upon the motion being made, if a sufficient case for the motion is made out upon the plaintiff's affidavits, and the defendant does not appear, the application is granted on affidavit of service (*g*). The order which is made on affidavit

(*y*) *Greer* v. *Bristol Tanning Co.*, 2 R. P. C. 268.

(*z*) *Fraser* v. *Whalley*, 2 H. & M. 10.

(*a*) As to the undertaking in damages, see *infra*.

(*b*) *In re Banwen Iron Co.*, 17 Jur. 127.

(*c*) *Arthur* v. *Consolidated Kent Collieries Co.*, (1905) 49 S. J. 46.

(*d*) *Cuthbert* v. *Fane*, 1 Jur. 890; *Turner* v. *Turner*, 15 Jur. 1165; *In re Banwen Iron Co.*, 17 Jur. 127; *Hinde* v. *Power*, (1913) W. N. 184.

(*e*) *Woodcock* v. *Oxford, etc., Railway Co.*, 10 Ha. App. 54; Dan. Ch. Pr. 1315. See *Hinde* v. *Power*, (1913) W. N. 184.

(*f*) *Cass* v. *Bailey*, Smith, Ch. Pr. 248 n.; *Yapp* v. *Williams*, (1901) W. N. 91.

(*g*) *Davidson* v. *Leslie*, 9 Beav. 104; *Angier* v. *May*, 3 W. R. 330.

of service is in the terms of the notice. The order is liable to be discharged if there be any irregularity in the notice (*k*), or affidavit (*i*) on which it is founded, or if it adds to (*k*) or departs from the terms of the notice (*l*).

Undertaking as to damages.

Where an interlocutory injunction or an *interim* restraining order is applied for, the Court will require the plaintiff, as a condition of its interference in his favour, to enter into an undertaking to abide by any order the Court may make as to damages. The undertaking was formerly required only in cases where the application was *ex parte*, but the present practice is to require the undertaking as well, where the motion is on notice, as where it is *ex parte* (*m*). When an undertaking is offered by the defendant and accepted by the plaintiff, a cross undertaking in damages by the plaintiff is inserted in the order, unless the contrary is agreed and expressed at the time (*n*). If the plaintiff is not within the jurisdiction the undertaking of some responsible person within the jurisdiction is required (*o*). An undertaking as to damages can be given by a married woman (*p*); even though she has not sufficient separate estate to satisfy the damages the opposite party may sustain by the injunction (*q*).

In the case of companies the practice used to be that an undertaking in damages must be given by a director or other

(*h*) *Moody* v. *Hebberd*, 17 L. J. Ch. 24; 11 Jur. 941.

(*i*) *Salomon* v. *Stalman*, 4 Beav. 243; 10 L. J. Ch. 327.

(*k*) *Pratt* v. *Walker*, 19 Beav. 261; 105 R. R. 133; *Ex parte Carew*, 23 L. J. Ch. 761.

(*l*) *Hutton* v. *Hepworth*, 6 Ha. 315.

(*m*) *Graham* v. *Campbell*, 7 C. D. 490; 47 L. J. Ch. 593; *Fenner* v. *Wilson*, (1893) 2 Ch. p. 658; 62 L. J. Ch. 984; *Att.-Gen.* v. *Albany Hotel Co.*, (1896) 2 Ch. p. 699; 65 L. J. Ch. 885; *Howard* v. *Press Printers Co.*, (1904) 74 L. J. Ch. 103, 105; *In re Hailstone*, (1910) 102 L. T. p. 881. See as to form of order, *Fenner* v. *Wilson*, (1893) 2 Ch. p. 658; 62 L. J. Ch. 984.

(*n*) Practice Note, Chancery Division, (1904) W. N. 203; and see *Oberrheinische Metallwerke* v. *Cocks*, (1906) W. N. 127. In *Howard* v. *Press Printers Co.*, (1904) 74 L. J. Ch. 100, the Court of Appeal had decided that there was no general practice that when an undertaking was offered by a defendant a cross undertaking in damages by the plaintiff was implied.

(*o*) *Hamilton* v. *Board*, 1 N. R. 379; 1 Set. 510.

(*p*) *Hunt* v. *Hunt*, (1884) W. N. 243; 54 L. J. Ch. 289; *Re Prynne*, (1885) W. N. 141; 53 L. T. 465.

(*q*) *Pike* v. *Cave*, 62 L. J. Ch. 937; 68 L. T. 650.

officer of the company, who was required to sign the Registrar's book, the undertaking of counsel on behalf of the company not being deemed sufficient (*r*). But the undertaking of counsel on behalf of a company is now considered sufficient (*s*). When a company is in liquidation, the Court may grant an interlocutory injunction without requiring a personal undertaking in damages by the liquidator (*t*).

Undertaking in damages—when dispensed with.

In an action for alleged infringement of a patent, the defendants having obtained an injunction restraining the plaintiff "until judgment in the action" from issuing advertisements threatening legal proceedings, it was held that the defendants were not bound to give an undertaking as to damages, the order not being one which it was intended that the Court should in any way review at the trial of the action (*u*). In granting an interlocutory injunction at the instance of the Attorney-General on behalf of the Crown, the Court will not as a general rule require an undertaking in damages to be given (*x*); but it is otherwise where a Secretary of State is the party applying for an injunction (*y*).

Undertaking remains in force though action dismissed.

The undertaking remains in force although the action is dismissed (*z*), and the Court at the hearing determines that the plaintiff is not entitled to an injunction. The defendant is entitled to the benefit of the undertaking even though it should be decided that the injunction was wrongly granted owing to the mistake of the Court itself (*a*).

Court cannot compel undertaking to be given.

The Court, however, has no power to compel a party

(*r*) *Anglo-Danubian, etc., Co.* v. *Rogerson*, 10 Jur. N. S. 87; and see *East Molesey Local Board* v. *Lambeth Waterworks Co.*, (1892) 3 Ch. p. 320.

(*s*) *East Molesey Local Board* v. *Lambeth Waterworks Co.*, *supra*; *Manchester Banking Co.* v. *Parkinson*, 60 L. T. 47.

(*t*) *Rosling & [illegible] v Guarantee and Trust Co.*, [illegible]) 47 S. J. 255. See *Westmins[illegible] Association* v. *Upward*, 24 S. J. 690, where an undertaking was offered by the liquidator.

(*u*) *Fenner* v. *Wilson*, (1893) 2 Ch. 656; 62 L. J. Ch. 984.

(*x*) *Att.-Gen.* v. *Albany Hotel Co.*, (1896) 2 Ch. 696; 65 L. J. Ch. 885.

(*y*) *Secretary of State for War* v. *Chubb*, 43 L. T. 83; and see *Att.-Gen.* v. *Albany Hotel Co.*, (1896) 2 Ch. p. 704; 65 L. J. Ch. p. 889.

(*z*) *Newby* v. *Harrison*, 3 De G. F. & J. 290; 30 L. J. Ch. 863.

(*a*) *Griffith* v. *Blake*, 27 C. D. 475; 53 L. J. Ch. 965; *Hunt* v. *Hunt*, 54 L. J. Ch. 289; *In re Hailstone*, (1910) 102 L. T. p. 880.

applying for an injunction to give an undertaking as to damages; but if the applicant refuses to give the undertaking in a case in which the Court considers that it ought to be given, the order for an injunction will not be made, or if pronounced it will not be drawn up (*b*).

Extent of undertaking.

The undertaking in damages is not confined to the damages which the persons restrained by the injunction may sustain, but applies to damages which any of the opposite parties in the action may sustain, although one or more only are restrained (*c*).

Terms imposed on applications for injunctions.

As, on the one hand, the Court may require the plaintiff, as the condition of its interference, in his favour, to enter into an undertaking as to damages, or, in some cases (*e.g.*, where it is sought to restrain a landlord from distraining for rent alleged to be due (*d*), or to restrain a mortgagee from selling (*e*), or a company from forfeiting shares for non-payment of calls (*f*)), to pay money into Court; so, on the other hand, it may require the defendant to enter into terms as a condition of withholding an injunction (*g*).

Motion for injunction treated as the trial of the action.

A motion for an injunction may by consent be treated as the trial of the action, a time being fixed for the plaintiff to file any affidavits he may desire, and also for the defendant to file affidavits in answer, and either party being at liberty after the cause has been set down to apply to have the case advanced (*h*).

Early trial.

Whenever an application is made before trial for an injunc-

(*b*) *Tucker* v. *New Brunswick Trading Co.*, 44 C. D. 249, 252; 59 L. J. Ch. 551; *Att.-Gen.* v. *Albany Hotel Co.*, (1896) 2 Ch. p. 700; 65 L. J. Ch. 885; *Howard* v. *Press Printers Co.*, (1904) 74 L. J. Ch. 103, 105.

(*c*) *Tucker* v. *New Brunswick Trading Co.*, *supra*.

(*d*) *Shaw* v. *Earl of Jersey*, 4 C. P. D. 359; affirming 48 L. J. C. P. 308.

(*e*) *Whitworth* v. *Rhodes*, 20 L. J. Ch. 105; *Warner* v. *Jacob*, 20 C. D. p. 224; 51 L. J. Ch. 642; *Macleod* v. *Jones*, 24 C. D. 289; 53 L. J. Ch. 145.

(*f*) *Lamb* v. *Sambas Rubber, etc., Co.*, (1908) 1 Ch. 845; 77 L. J. Ch. 386; *Jones* v. *Pacaya Rubber, etc., Co.*, (1911) 1 K. B. 455; 80 L. J. K. B. 155.

(*g*) *Ante*, pp. 28, 29.

(*h*) *Wilkinson* v. *Cummins*, 11 Ha. 313; *Aslatt* v. *Corporation of Southampton*, 16 C. D. 143, 150; 50 L. J. Ch. 33. See *Newson* v. *Pender*, 27 C. D. p. 59; 33 W. R. 243.

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tion or other order, and on the opening of such application, or at any time during the hearing thereof, it appears to the judge that the matter in controversy is one which can be most conveniently dealt with by an *early trial*, the judge may make an order for such trial accordingly, and direct such trial to be held at the next or any other Assizes for any place, if from local or other circumstances it appears convenient so to do, and in the meantime may make such order as the justice of the case may require (*i*).

Suspension of injunction pending appeal.

When an injunction is granted the Court will sometimes suspend its operation pending an appeal; and, on the other hand, where an injunction is refused, the Court may nevertheless prevent a fund in reference to which the injunction is claimed being dealt with pending an appeal (*k*). An appeal does not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal may order (*l*).

Where on appeal an injunction is granted but its operation is suspended, the Court of first instance, upon subsequent application to it, has jurisdiction to extend the period of suspension (*m*).

The Judicature Act, 1894 (*n*), which requires the leave of the judge or Court of Appeal to the bringing of an appeal from an interlocutory order, expressly excepts (*inter alia*) cases of granting or refusing an injunction.

Terms of the order.

The terms of the order granting an injunction should be such that it is quite plain what it permits and what it prohibits (*o*). An order which merely prohibits a man from doing what he has no authority to do, without showing him what are the limits of his authority, and leaves him to find out what is forbidden and what is allowed, is irregular (*p*).

Form of order.

The orders pronounced by the Court upon application for

(*i*) R. S. C. Ord. L. r. 1A.

(*k*) See *ante*, pp. 31, 32.

(*l*) R. S. C. Ord. LVIII. r. 16.

(*m*) *Shelfer* v. *City of London Electric Lighting Co.*, (1895), 2 Ch. 388; 64 L. J. Ch. 736.

(*n*) Sect. 1, sub-s. 1 (b) (ii.).

(*o*) *Att.-Gen.* v. *Staffordshire County Council*, (1905) 1 Ch. p. 342; 74 L. J. Ch. p. 155.

(*p*) *Collier* v. *Midland Railway Co.*, 2 Ph. p. 472; 17 L. J. Ch.

interlocutory injunctions have varied at different times (*q*). Under the former practice the form usually adopted was "until the hearing of the cause." Under the present practice it is "until judgment in this action, or until further order," to show that the injunction is not to extend beyond the date when judgment is given, unless then continued, nor until judgment if discharged previously by order of the Court (*r*).

Though an injunction restraining the act complained of is claimed against the defendant alone, the order will, if necessary, be extended to his servants, workmen, and agents; and it is of course to insert these words (*s*).

Drawing up of order for injunction.

Notice of injunction.

An order for an injunction having been obtained, it should, unless otherwise ordered, be drawn up and entered within fourteen days from the date thereof (*t*). In cases where the matter is so urgent that the object of the injunction might be defeated if the party were bound to wait till the order could be passed, the practice is to serve the party personally with notice in writing that the injunction has been ordered, and that it will be sealed and served as soon as it can be passed through the offices, or else to procure a transcript of the minutes of the order signed by the registrar, and to serve the same personally by delivering a copy of it, showing at the same time the original transcript so signed (*u*). In country cases the terms of an injunction can be communicated, as soon as it is granted, by telegraph to an agent at the place where the defendant is, with instructions to give him notice of the order (*x*).

236; *Warden of Dover Harbour* v. *London, Chatham and Dover Railway Co.*, 3 De G. F. & J. p. 564; 30 L. J. Ch. p. 479; *Low* v. *Innes*, 4 De G. J. & S. p. 295.

(*q*) *Lane* v. *Newdigate*, 10 Ves. 192; 7 R. R. 381.

(*r*) 1 Set. 508.

(*s*) Ib.

(*t*) R. S. C. Ord. LXII. r. 14a. See *In re Empire and Guarantee Insurance Co.*, (1912) W. N. 92; 56 S. J. 444.

(*u*) *Kimpton* v. *Eve*, 2 V. & B. 349; 13 R. R. 116; *Vansandau* v. *Rose*, 2 J. & W. 264; 22 R. R. 114; *M'Neill* v. *Garratt*, Cr. & Ph. 98; 10 L. J. Ch. 297; 54 R. R. 223; *Gooch* v. *Marshall*, 8 W. R. 410.

(*x*) See *In re Bryant*, 4 C. D. 98; 35 L. T. 489; *Ex parte Langley*, 13 C. D. 110, 122; 49 L. J. Bk. 71; *The Seraglio*, 10 P. D. p. 121; 54 L. J. Adm. 76; *D.* v. *A. & Co.*, (1900) 1 Ch. p. 487; 69 L. J. Ch. p. 384; *Curtice* v. *London City and Midland Bank*, (1908) 1 K. B. p. 297; 77 L. J. K. B. p. 344.

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Service of restraining order.

The order when drawn up should be served, and such service should be personal (*y*), and is effected by delivering to or leaving with the person enjoined a true copy of the order indorsed in the manner before mentioned, and at the same time exhibiting to him an authenticated office copy thereof (*z*).

Substituted service.

If it can be satisfactorily made to appear that the defendant is keeping out of the way, the Court may make such order for substituted or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just (*a*).

Notice before action not necessary.

A man whose legal right has been invaded is under no obligation to make an application to the defendant before bringing his action for an injunction. He may on discovering that the defendant has violated his legal right issue a writ and serve defendant with notice of motion for an injunction. He is not under any obligation to give the defendant notice and ascertain whether he will do all that is needed. It is immaterial that the defendant may have been acting in the matter without any fraudulent intent (*b*).

Costs where defendant has offered to submit.

If, however, the plaintiff give notice to the defendant that he is violating his legal right, and the defendant, on the receipt of the notice, offers to enter into an undertaking or submit to an injunction, the plaintiff if he proceeds with the action will not have his subsequent costs (*c*). But if the defendant on the receipt of the notice do not offer to the plaintiff the redress to which he is entitled, the plaintiff may

(*y*) *Vansandau* v. *Rose*, 2 J. & W. 264; 22 R. R. 214; *Gooch* v. *Marshall*, 8 W. R. 410. See, however, *post*, pp. 686, 687.

(*z*) R. S. C. Ord. LXVII. r. 1.

(*a*) Ib. r. 6.

(*b*) *Burgess* v. *Hill*, 26 Beav. 244; 28 L. J. Ch. 356; *Upmann* v. *Forester*, 24 C. D. 231; 52 L. J. Ch. 946; *Goodhart* v. *Hyett*, 25 C. D. 182; 53 L. J. Ch. 219; *Witman* v. *Oppenheim*, 27 C. D. 260; 54 L. J. Ch. 56; *Weingarten* v. *Bayer*, (1905) L. T. p. 513; 22 R. P. C. p. 350 (trade mark). See, however, *American Tobacco Co.* v. *Guest*, (1892) 1 Ch. 630; 61 L. J. Ch. 242; *Burberrys* v. *Watkinson*, (1906) 23 R. P. C. 141. As to costs see also the Public Authorities Protection Act, 1893, s. 1 (c), (d).

(*c*) *Jenkins* v. *Hope*, (1896) 1 Ch. 278; 65 L. J. Ch. 249; *Slazenger & Sons* v. *Spalding Brothers*, (1910) 1 Ch. 257, 261; 79 L. J. Ch. 122; *John Brinsmead & Co.* v. *Stanley Brinsmead and Waddington*, (1913) 29 T. L. R. 237.

go on with the action and will be entitled to his costs (*d*). In a case where the defendant innocently infringed the plaintiffs' registered trade mark, but offered to submit to a perpetual injunction in the terms of the plaintiffs' notice of motion and to pay a sum of 10*l.* by way of nominal damages and costs up to date, but the plaintiffs proceeded with the action for an account of profits or an inquiry as to damages, the Court held that the plaintiffs were wrong in proceeding with their action for an account or inquiry, and gave the defendant the costs of the action after the date of his offer, and the plaintiff costs up to that date, with the usual set-off (*e*).

Mode of trial.

Causes or matters assigned by the Judicature Act, 1873, to the Chancery Division are to be tried by a judge without a jury, unless the Court or a judge shall otherwise order (*f*).

The Court has in such cases a discretion to direct a trial with a jury; and where a judge has, in the exercise of such discretion, directed a trial by a jury, the Court of Appeal will not interfere with the discretion of the judge, unless it is clear that his discretion has been wrongly exercised (*g*).

Under this rule (*h*) the Court will not order an action to be tried before a jury unless there is a simple question of fact, the verdict upon which would decide the issue in the action (*i*), and even in such a case it is a matter for the discretion of the judge whether the case should be heard before a jury (*k*).

(*d*) *Upmann* v. *Elkan*, 12 Eq. 140; 40 L. J. Ch. 475; *Cooper* v. *Whittingham*, 15 C. D. p. 506; 49 L. J. Ch. 752; *Fennessy* v. *Day and Martin*, 55 L. T. 161; *Schlesinger* v. *Turner*, 33 L. T. 764; *Henry Clay* v. *Phillips & Co.*, (1910) 27 R. P. C. 508, where defendant offered to submit to an injunction and pay costs, but on condition that the order should not be advertised. Cf. *Walter* v. *Steinkopff*, (1892) 3 Ch. 489; 61 L. J. Ch. 521.

(*e*) *Slazenger & Sons* v. *Spalding Brothers*, (1910) 1 Ch. 257; 79 L. J. Ch. 122.

(*f*) R. S. C. Ord. XXXVI. r. 3; see *Coats* v. *Herefordshire County Council*, (1909) 2 Ch. p. 587; 78 L. J. Ch. p. 571.

(*g*) See *Ormerod* v. *Todmorden Mill Co.*, 8 Q. B. D. 664; 51 L. J. Q. B. 348; *Att.-Gen.* v. *Tyne*, 38 W. R. 195, per Fry, L.J.; *Jenkins* v. *Bushby*, (1891) 1 Ch. 490; 60 L. J. Ch. 264.

(*h*) R. S. C. Ord. XXXVI. r. 3.

(*i*) *Cardinall* v. *Cardinall*, 25 C. D. 772; 53 L. J. Ch. 636; *Moss* v. *Bradburn*, 32 W. R. 368.

(*k*) *Gardner* v. *Jay*, 29 C. D. 50; 54 L. J. Ch. 762; *Sheppard* v. *Gilmore*, 34 W. R. 179.

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Actions for infringement of patents are to be tried without a jury unless the Court otherwise directs (*l*).

Trial without a jury.

The Court or a judge may, if it appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Judicature Act could, without any consent of parties, have been tried without a jury (*m*).

The words "question of fact" in this rule refer to a question of fact upon which the title to relief depends, and not a question as to the amount of damages (*n*).

The Court of Appeal will not interfere with the discretion of the judge in ordering a trial without a jury unless it is satisfied on very clear grounds that the discretion of the judge has not been correctly exercised (*o*).

The Court or a judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts or any scientific or local investigation which cannot in their or his opinion conveniently be made with a jury (*p*).

This rule merely preserves the old practice of the Common Law Courts. There was always power in such actions as are referred to in the rule to order a trial without a jury. The rule has no application to actions which apart from it are properly triable without a jury (*q*).

In any other cause or matter, upon the application (within ten days after notice of trial has been given) of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury (*r*).

The words "other cause or matter" mean other than the causes or matters which are not provided for by the previous

(*l*) Patents and Designs Act, 1907 (7 Edw. VII. c. 29), s. 31, sub.-s. 1.

(*m*) R. S. C. Ord. XXXVI. r. 4.

(*n*) *Fennessy* v. *Clark*, 37 C. D. 184, 187; 57 L. J. Ch. 398.

(*o*) *Burgoine* v. *Moordaff*, 8 P. D. p. 208; 52 L. J. P. 77. See *De Freyne* (*Lord*) v. *Johnstone*, (1904) 20 T. L. R. 454 (H. L.).

(*p*) R. S. C. Ord. XXXVI. r. 5.

(*q*) *Jenkins* v. *Bushby*, (1891) 1 Ch. p. 490; 60 L. J. Ch. p. 255.

(*r*) R. S. C. Ord. XXXVI. r. 6.

rules (*s*). In cases which under the former practice could, without consent, be tried without a jury the Court has a discretion as to ordering a trial with a jury, and those who ask the judge to exercise the discretion must show the judge a reason for his doing so (*t*); and in the exercise of this discretion the Court will not allow the matter to go before a jury unless in cases where there is a question to be decided which may be conveniently and better decided by a jury than by the Court without a jury (*u*).

In every cause or matter, unless under the provisions of R. S. C. Ord. XXXVI. r. 6 a trial with a jury is ordered, or under r. 2 of that Order either party has signified a desire to have a trial with a jury, the mode of trial is to be by a judge without a jury; provided that in any such case the Court or a judge may at any time order any cause, matter, or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors (*x*).

This rule applies to all actions in the High Court, except those in which either party has a right to trial by jury, and has insisted on such right in the mode prescribed by Rules 2 or 6 (*y*). The rule allows a judge in his discretion to direct that a party may have a jury in cases in which parties had formerly no such right (*z*).

(*s*) *I.c.*, rules 3, 4 and 5 of Ord. XXXVI.; *Jenkins* v. *Bushby*, (1891) 1 Ch. p. 489; 60 L. J. Ch. p. 255. See *Baring* v. *N. W. of Uruguay Railway Co.*, (1893) 2 Q. B. 406, 411; 69 L. T. 740; *Kinnaird (Lord)* v. *Field*, (1905) 2 Ch. p. 370; 74 L. J. Ch. p. 696.

(*t*) *The Temple Bar*, 11 P. D. 6; 55 L. J. P. 1; *Coote* v. *Ingr* 5 C. D. 117; 56 L. J. Ch. 634; *Fanshaw* v. *London, etc., Dairy Co.*, 38 C. D. 73; 36 W. R. 418.

(*u*) *Ruston* v. *Tobin*, 10 C. D. 563; 40 L. T. 111. See *Sugg* v. *Silber*, 1 Q. B. D. 362; 45 L. J. Q. B. 460; *West* v. *White*, 4 C. D. 631; 46 L. J. Ch. 333; *Bordier* v. *Burrell*, 5 C. D. 514; 46 L. J. Ch. 612; *Powell* v. *Williams*, 12 C. D. 234; 40 L. T. 679; *Clarke* v. *Skipper*, 21 C. D. 134; 51 L. J. Ch. 519; *Coote* v. *Ingram*, 35 C. D. 117; 56 L. J. Ch. 634; *Timson* v. *Wilson*, 38 C. D. 72; 59 L. T. 76.

(*x*) R. S. C. Order XXXVI. r. 7 (a); and see *West* v. *White*, *Bordier* v. *Burrell*, *Clarke* v. *Skipper*, *supra*.

(*y*) *Jenkins* v. *Bushby*, (1891) 1 Ch. p. 490; 60 L. J. Ch. 264.

(*z*) *The Temple Bar*, 11 P. D. 6; 55 L. J. P. 1; *Coote* v. *Ingram*, 35 C. D. 117; 56 L. J. Ch. 634; *Fan-*

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Arbitration Act 1889.

The Arbitration Act, 1889, provides that, subject to rules of Court and to any right to have particular cases tried by a jury, the Court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee (*a*). The report of an official or special referee may be adopted wholly or partially by the Court or a judge, and if so adopted may be enforced as a judgment or order to the same effect (*b*).

This Act also provides (*c*) that in any cause or matter (other than a criminal proceeding by the Crown)—(1) if all the parties interested who are not under disability consent; or (2) if the cause or matter requires any prolonged examination of documents, or any scientific or local investigation which cannot, in the opinion of the Court or a judge, conveniently be made before a jury or conducted by the Court through its ordinary officers; or (3) if the question in dispute consists wholly or in part of matters of account, the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court.

Trial of action at assizes.

An action in the Chancery Division, as well as an issue or question therein, may be ordered to be tried at the assizes (*d*).

Where in an action commenced in the Chancery Division it is expedient to have all the issues tried by a jury, and there is nothing to render it necessary that the matter should come back to the Chancery Division, the most convenient course is to transfer the action altogether to the King's Bench Division (*e*).

Scientific evidence, experts, &c., &c.

The Judge in Chambers may, in such way as he thinks fit,

shaw v. *London, etc., Dairy Co.*, 38 C. D. 73; 36 W. R. 418.

(*a*) Sect. 13, sub-s. 1.

(*b*) Sect. 13, sub-s. 2.

(*c*) Sect. 14.

(*d*) *Wood* v. *Hamblet*, 6 C. D. 113; 47 L. J. Ch. 113; see *Coats* v. *Herefordshire County Council*, (1909) 2 Ch. pp. 586, 587; 78 L. J. Ch. p. 571; and see Ord. L. r. 1 (a).

(*e*) *Hunt* v. *Chambers*, 20 C. D. 365; 51 L. J. Ch. 683; *Maugan* v. *Met. Electric Supply Co.*, (1891) 2 Ch. 551; 65 L. T. 202; *Forrester* v. *Jones*, (1899) W. N. p. 78; 43 S. J. 545; and see R. S. C. Ord. XLIX. r. 3.

obtain the assistance of accountants, merchants, engineers, or other scientific persons, the better to enable any matter at once to be determined, and he may act upon the certificate of any such person (*f*). If upon the trial of an action there is such a conflict of evidence that the opinion of an independent surveyor or scientific expert becomes necessary for the Court to come to a conclusion as to questions of fact, such questions may be referred for inquiry and report to an official or special referee (*g*). A surveyor so appointed acts in a *quasi*-judicial capacity, and is not subject to examination as a witness (*h*). The Court of Appeal may, without the consent of the parties, refer any question arising on the appeal to an expert to inquire and report (*i*).

Where a plaintiff has proved his right to an injunction against a nuisance, it is no part of the duty of the Court to refer it to an expert to report as to the best mode of abating the nuisance, though where there is a serious difficulty in removing the injury to the plaintiff, the Court will suspend the operation of the injunction for a time with liberty to the defendant to apply for a further extension of time (*k*).

Detention, preservation, or inspection of property.

By R. S. C. Ord. L. r. 3, power is given to the Court or a judge upon the application of any party to a cause or matter, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property, being the subject of such cause or matter, and for the purpose aforesaid to authorise any person or persons to enter upon or into any land or building in the possession of any party to

(*f*) R. S. C. Ord. LV. r. 19.

(*g*) *Case* v. *Midland Railway Co.*, 27 Beav. 247; *Cartwright* v. *Last*, Craven v. *Kay*, Set. 401, 402; *Broder* v. *Saillard*, 2 Ch. D. p. 695; 45 L. J. Ch. 414; *Badische Anilin, etc., Fabrik* v. *Levinstein*, 24 Ch. D. p. 158; 52 L. J. Ch. 704; Arbitration Act, 1889, s. 13; and see *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 192; 73 L. J. Ch. p. 492.

(*h*) *Broder* v. *Saillard*, 24 W. R. 456.

(*i*) See *Att.-Gen.* v. *Birmingham, Tame, etc., Drainage Board*, (1910) 1 Ch. 48; 79 L. J. Ch. 137; varied on appeal, (1912) A. C. 788; 82 L. J. Ch. 45.

(*k*) *Att.-Gen.* v. *Colney Hatch Asylum*, 4 Ch. 146; 19 L. T. 708. See *Islington Vestry* v. *Hornsey Urban Council*, (1900) 1 Ch. 706, 707.

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such cause or matter, and to authorise any samples to be take or any observation to be made or experiment to be trie which may be necessary or expedient for the purpose of ol taining full information or evidence (*l*). The rule extend to every case where the Court considers that somethir should be done for the security of the property in que tion (*m*).

Under this rule the Court has granted an *interim* injun tion to restrain a defendant from ceasing to pump water o of a mine, in order to preserve it from injury (*n*), and ha restrained a party from dealing with a fund pending a appeal (*o*).

Application for inspection of property.

An application for an order for inspection may be mad by any party to the cause. It may be made by the plainti after notice to the defendant at any time after the issue o the writ. If it be made by any other party, it must be mad on notice to the plaintiff and after appearance by the part making the application (*p*). The application may be mad by motion or summons (*q*). It is usually made on applica tion for an interlocutory injunction, but it is immaterial a what stage of the proceedings the application is made. Unde the rule the Court has granted leave to a plaintiff before tria to enter upon the defendant's land and excavate soil fo the purpose of inspection (*r*).

The application for an order for inspection should ordinaril

(*l*) See *Leney & Co.* v. *Callingham*, (1908) 1 K. B. p. 84; 77 L. J. K. B. p. 67; and as to costs, *Mitchell* v. *Darley Main Colliery Co.*, 10 Q. B. D. 457; 52 L. J. Q. B. 394; *Ashworth* v. *English Card Clothing Co.*, (1904) 1 Ch. 702; 73 L. J. Ch. 274. As to the power of the judge before whom a cause or matter is heard, to inspect any property or thing concerning which any question may arise therein, see R. S. C. Ord. L. r. 4; and *London General Omnibus Co.* v. *Lavell*, (1901) 1 Ch. 135; 70 L. J. Ch. 17.

(*m*) *Chaplin* v. *Barnett*, (1912) 28 T. L. R. 256.

(*n*) *Strelley* v. *Pearson*, 15 C. B. 113; 49 L. J. Ch. 406.

(*o*) *Polini* v. *Gray*, 12 Ch. D. 438, 443; 49 L. J. Ch. 41.

(*p*) R. S. C. Ord. L. r. 5.

(*q*) See *Bradford Corporation* v. *Ferrand*, 86 L. T. 497.

(*r*) *Lamb* v. *Beaumont*, 27 C. T. 356; 53 L. J. Ch. 1111. Cf. *Brad ford Corporation* v. *Ferrand*, *supra* where an interlocutory order was refused. See also *Bennett* v. *White house*, 28 Beav. 119; 29 L. J. Ch. 326 (inspection of adjoining mine

be on notice (*s*), but under special circumstances it may be made *ex parte* (*t*).

Damages.

The Court of Chancery had no inherent power to ascertain the amount of damages sustained by reason of tortious acts unattended with profit to the wrongdoer. But the jurisdiction to give and assess damages in respect of such acts was conferred on the Court of Chancery by Lord Cairns' Act, 21 & 22 Vict. c. 27. It was declared by sect. 2 of that Act that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, the same Court may award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct. Though this section of Lord Cairns' Act was repealed by the Statute Law Revision Act, 1883, s. 3, the jurisdiction was preserved by sect. 5 of the same statute (*u*). It is not, however, necessary to have recourse to Lord Cairns' Act, for the High Court of Justice has now full power under the Judicature Act, 1873, to give either an injunction or damages (*x*); and the Court's power is larger than the power it possessed under Lord Cairns' Act, for under Lord Cairns' Act the plaintiff had first to make out that he was entitled to an equitable remedy before he could obtain damages (*y*).

Damages or injunction.

In determining whether it shall grant an injunction or damages in lieu of an injunction, the Court exercises a discretion. But this discretion must be a judicial discretion

(*s*) See R. S. C. Ord. L. r. 6; Ord. XXX. r. 2.

(*t*) *Hennessy* v. *Bowman*, (1877) W. N. 14.

(*u*) *Sayers* v. *Collyer*, 28 C. D. 103; 54 L. J. Ch. 1; *Dreyfus* v. *Peruvian Guano Co.*, 42 C. D. p. 73; 62 L. T. 518; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. 287; 64 L. J. Ch. 216; *Cowper* v. *Laidler*, (1903) 2 Ch. p. 338; 72 L. J. Ch. p. 579; *In re It.*, (1906) 1 Ch. p. 735; 75 L. J. Ch. p. 423.

(*x*) Ib.

(*y*) *Elmore* v. *Pirrie*, 57 L. T. 353.

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Injunction.

exercised according to something like a settled rule in such a way as to prevent a man doing a wrongful act and thinking that he can pay damages for it (*z*). If the injury complained of is a breach of a negative covenant (*a*), or cannot fairly be compensated by a money payment (*b*), or is of a very serious nature (*c*), or if the defendant has acted in a high-handed and unfair manner (*d*), the plaintiff is entitled to an injunction.

Damages.

Damages may be given instead of an injunction when the following requirements are found in combination, viz., where the injury is: (i.) small; (ii.) capable of being estimated in money; (iii.) capable of being adequately compensated by a small sum; and (iv.) when an injunction would be oppressive (*e*).

(*z*) *Smith* v. *Smith*, 20 Eq. p. 505; 44 L. J. Ch. 630; *Krehl* v. *Burrell*, 7 C. D. 551; 47 L. J. Ch. 353; 11 C. D. p. 148; 48 L. J. Ch. 252; *Holland* v. *Worley*, 26 C. D. 578; 54 L. J. Ch. 268; *Greenwood* v. *Hornsey*, 33 C. D. 471; 55 L. J. Ch. 917; *Martin* v. *Price*, (1894) 1 Ch. 276, 285; 63 L. J. Ch. 209; *Cowper* v. *Laidler*, (1903) 2 Ch. p. 341; 72 L. J. Ch. p. 580; *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 193; 73 L. J. Ch. p. 492; *Saunby* v. *London (Out) Water Commissioners*, (1906) A. C. pp. 115, 116; 75 L. J. P. C. p. 27; and see *Jones* v. *Tankerville (Earl)*, (1909) 2 Ch. p. 446; 78 L. J. Ch. p. 676; *Gilling* v. *Gray*, (1910) 27 T. L. R. 40.

(*a*) *Doherty* v. *Allman*, 3 A. C. p. 720; 39 L. T. p. 130; *McEacharn* v. *Colton*, (1902) A. C. p. 107; 71 L. J. P. C. p. 21; *Formby* v. *Barker*, (1903) 2 Ch. p. 554; 72 L. J. Ch. p. 721; *Elliston* v. *Reacher*, (1908) 2 Ch. p. 395; 79 L. J. Ch. p. 628; *Att.-Gen.* v. *Walthamstow Urban Council*, (1910) 1 Ch. p. 351; 79 L. J. Ch. p. 269.

(*b*) *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 193; 73 L. J. Ch. p. 492; *Jones* v. *Tankerville (Earl)*, (1909) 2 Ch. p. 446; 78 L. J. Ch. p. 676.

(*c*) *Krehl* v. *Burrell*, 7 C. D. 551; 47 L. J. Ch. 353; 11 C. D. 146; 48 L. J. Ch. 252; *Holland* v. *Worley*, 26 C. D. 578; 54 L. J. Ch. 268; *Greenwood* v. *Hornsey*, 33 C. D. 471; 55 L. J. Ch. 917; *Martin* v. *Price*, (1894) 1 Ch. 276; 63 L. J. Ch. 209; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. 287; 64 L. J. Ch. 216; *Cowper* v. *Laidler*, (1903) 2 Ch. p. 341; 72 L. J. Ch. p. 580; *Kine* v. *Jolly*, (1905) 1 Ch. p. 504; 74 L. J. Ch. p. 183; *Saunby* v. *London (Out) Water Commissioners*, (1906) A. C. pp. 115, 116; 75 L. J. P. C. p. 27; *Jones* v. *Tankerville (Earl)*, (1909) 2 Ch. p. 446; 78 L. J. Ch. p. 676.

(*d*) *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. p. 323; 64 L. J. Ch. p. 229; *Kine* v. *Jolly*, (1905) 1 Ch. p. 503; 74 L. J. Ch. p. 183; *Jones* v. *Tankerville (Earl)*, *supra*.

(*e*) *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. p. 322; 64 L. J. Ch. pp. 226, 229;

In a case of continuing actionable nuisance, damages instead of an injunction will only be given in very exceptional circumstances (*f*); but there is no jurisdiction to give damages in respect of a threatened injury, where no wrongful act has been committed (*g*).

Acquiescence is one of those circumstances which the Court takes into consideration in deciding whether it should give damages or an injunction (*h*).

In order that damages should be an adequate substitute for an injunction, they must cover the whole area which would have been covered by the injunction. They must comprise as well the damages for wrongful acts continued up to the time of trial as for those which had taken place before the issue of the writ (*i*). If the wrongful act has come to an end before the trial, the Court has jurisdiction nevertheless to assess the whole of the damages accrued (*k*).

Where there is no difficulty in assessing damages, the judge will assess them at the trial, and thus save the expense of an inquiry (*l*).

Injunction and damages.

In a proper case the Court will grant an injunction to

Cowper v. *Laidler*, (1903) 2 Ch. p. 341; 72 L. J. Ch. p. 580, *Colls* v. *Home and Colonial Stores*, (1904) A. C. p. 193; 73 L. J. Ch. p. 492; *Kine* v. *Jolly*, (1905) 1 Ch. pp. 495, 496; 74 L. J. Ch. p. 183; *Riley* v. *Halifax Corporation*, (1907) 97 L. T. 278; 23 T. L. R. 613.

(*f*) *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. 287, 319; 64 L. J. Ch. p. 227. See *Cowper* v. *Laidler*, (1903) 2 Ch. pp. 339, 341; 72 L. J. Ch. pp. 579, 580; *Gilling* v. *Grey*, (1910) 27 T. L. R. 40; *Jones* v. *Llanwryst Urban Council*, (1911) 1 Ch. 393, 411; 80 L. J. Ch. 145.

(*g*) *Dreyfus* v. *Peruvian Guano Co.*, 43 C. D. 316; 62 L. T. 518; *Martin* v. *Price*, (1894) 1 Ch. pp. 284, 285; 63 L. J. Ch. 209; *Cowper* v. *Laidler*, (1903) 2 Ch. 339, 341; 72 L. J. Ch. p. 580.

(*h*) *Sayers* v. *Collyer*, 28 C. D. 103; 54 L. J. Ch. 1; *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. p. 322; 64 L. J. Ch. p. 229.

(*i*) *Fritz* v. *Hobson*, 14 C. D. 543; 49 L. J. Ch. 321; *Chapman* v. *Auckland Union*, 23 Q. B. D. 294, 298; 58 L. J. Q. B. 504; and R. S. C. Ord. XXXVI. r. 58; *Hole* v. *Chard Union*, (1894) 1 Ch. 293; 63 L. J. Ch. 469.

(*k*) *Fritz* v. *Hobson*, *supra*; *Davenport* v. *Ryland*, 1 Eq. 302; 35 L. J. Ch. 204.

(*l*) *Crawford* v. *Hornsea Steam, &c., Co.*, (1876) W. N. 132; *Holland* v. *Worley*, 26 C. D. p. 587; 54 L. J. Ch. 268.

restrain a repetition of the wrongful act, and give damages in respect of the past injury (*m*).

Innocent infringement of copyright.

In an action for infringement of copyright a plaintiff is not entitled to any remedy but an injunction, if the defendant alleges in his defence that he was not aware of the existence of the copyright, and also proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work (*n*).

Inquiry as to damages.

An inquiry as to damages will not be directed in a patent action in addition to an account of profits (*o*). Nor will an inquiry as to damages be directed where the plaintiff has opened a case of substantial injury entitling him to an injunction and damages and has failed to prove any substantial injury (*p*). When the plaintiff discontinues his action (*q*), or fails on the merits at the trial, the defendant is entitled to an inquiry on the plaintiff's undertaking as to damages sustained by him by reason of the interlocutory injunction (*r*); unless there are special circumstances disentitling him to such inquiry (*s*).

Damages need not be specifically claimed.

To entitle a party to damages, it is not necessary that damages should be specifically prayed for. Damage may be had under the prayer for general relief (*t*). A man who has brought an action for relief and damages does not lose his

(*m*) *Gilling* v. *Gray* (1910), 27 T. L. R. 40.

(*n*) Copyright Act, 1911, s. 8. See *Byrne* v. *The Statist Co.*, (1914) 30 T. L. R. 254; W. N. 37. As to exemption of innocent infringer of a patent from liability to damages, see Patents and Designs Act, 1907, sect. 33.

(*o*) *Neilson* v. *Betts*, L. R. 5 H. L. 1; 40 L. J. Ch. 317; *De Vitre* v. *Betts*, L. R. 6 H. L. 321; *United Horseshoe Co.* v. *Stewart*, 13 A. C. p. 412; 59 L. T. 561; *Saccharin Corporation* v. *Chemicals and Drug Co.*, (1900) 2 Ch. p. 558; 69 L. J. Ch. p. 821.

(*p*) *Kino* v. *Rudkin*, 6 C. D. 165; 46 L. J. Ch. 807.

(*q*) *Newcomen* v. *Coulson*, 7 C. D. 764; 47 L. J. Ch. 429.

(*r*) *Kino* v. *Rudkin*, *supra*; *Ross* v. *Buxton*, (1888) W. N. 55; *Griffith* v. *Blake*, 27 C. D. p. 477; 53 L. J. Ch. 965; *In re Hailstone*, (1910) 102 L. T. p. 880.

(*s*) *Smith* v. *Day*, 21 C. D. 421; 48 L. T. 54; *Griffith* v. *Blake*, *supra*; and see *Bingley* v. *Marshall*, 9 L. T. 144; 11 W. R. 1018; *Ex parte Hall*, 23 C. D. 644; 52 L. J. Ch. 907; and see *post*, sect. 5 of this chapter.

(*t*) *Catton* v. *Wyld*, 32 Beav. 266; *Betts* v. *Neilson*, 3 Ch. p. 441; 37 L. J. Ch. 321; *Lady Stanley* v. *Lord Shrewsbury*, 19 Eq. 616; 44 L. J. Ch. 389.

right to damages because performance has been obtained from the defendant before the suit comes to a hearing (*u*).

SECTION 2.—DISSOLUTION OF INJUNCTION.

An interlocutory injunction may be dissolved at any time before judgment in the action. A defendant who wishes to have an injunction dissolved must serve the plaintiff with notice of motion for that purpose. If other parties are interested with the applicant as co-defendants, it may be necessary to serve them also with the notice of motion (*x*).

Where an *interim* order has been obtained by the plaintiff, and simultaneous applications are made for an injunction, and to discharge the order, the plaintiff is entitled to begin (*y*).

An injunction cannot, on the motion to dissolve, be sustained on grounds not raised by the statement of claim (*z*). Nor is it competent for the plaintiff, on the motion to dissolve, to make a new case (*a*).

Notice of motion for dissolution.

Unless the Court gives special leave to the contrary, there must be at least two clear days between the service of notice of motion to dissolve, and the day named in the notice for hearing the motion (*b*). If special leave be given by the Court, the leave must be stated in the notice (*c*). The notice should be given for one of the days appropriated to the hearing of motions (*d*); but, if a case of urgency be made out, leave may be had from the Court to give notice of motion for a day not appropriated to the hearing of motions. The notice should state that the motion is with leave (*e*). The plaintiff is sometimes required by the *interim* order to undertake that he will accept short notice to discharge the order (*f*).

The motion to dissolve should be made before the Court by

(*u*) *Cory* v. *Thames Iron, &c. Co.*, 11 W. R. 589.

(*x*) *Service* v. *Castaneda*, 9 Jur. 367.

(*y*) *Fraser* v. *Whalley*, 2 H. & M. 10.

(*z*) *Burdett* v. *Hay*, 4 De G. J. & S. 41; 32 L. J. Ch. 41.

(*a*) *Barker* v. *North Staffordshire Railway Co.*, 5 Ra. Ca. 401.

(*b*) R. S. C. Ord. LII. r. 5.

(*c*) *Dawson* v. *Beeson*, 22 C. D. 504; 48 L. T. 407.

(*d*) *Steedman* v. *Poole*, 11 Jur. 555.

(*e*) *Dawson* v. *Beeson*, *supra*.

(*f*) 1 Set. 507.

which the injunction was granted (*g*). But if the cause has been transferred to another branch of the Court the application may be made to that branch of the Court to which the cause has become attached (*h*). Where, on appeal, an injunction was granted but its operation was suspended, it was held that an application for the further suspension of the injunction might have been properly made to the Court of first instance (*i*).

Evidence on motion to dissolve.

Upon motion to dissolve, the plaintiff has no right to insist that the motion shall stand over in order to give him time to cross-examine witnesses who have made affidavits for the defendant (*k*): affidavits filed in support of statements introdueed by amendment after injunction granted, and tending to support the injunction, cannot be read on motion to dissolve that injunction (*l*).

Motion to dissolve *ex parte* injunctions.

If, on the motion to dissolve an *ex parte* injunction, it appear that the plaintiff has misstated his case, either by misrepresentation, or by the suppression of material facts, so that an injunction has been obtained which would not have been obtained if a more accurate statement of the case had been made, the injunction will be dissolved on that ground alone (*m*). The plaintiff will not be allowed to maintain it on the merits then disclosed (*n*). Nor can he be heard to say that he was not aware of the importance of the facts so misstated or concealed (*o*), or that he had forgotten them (*p*).

(*g*) *Paredes* v. *Lizardi*, 9 Beav. 490. See *Hammond* v. *Smith*, 15 L. J. Ch. 40.

(*h*) *Sturgeon* v. *Hooker*, 1 De G. & S. 484.

(*i*) *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 2 Ch. 388; 64 L. J. Ch. 736.

(*k*) *Normanville* v. *Stanning*, 10 Ha. App. 20.

(*l*) *Prince Albert* v. *Strange*, 1 Mac. & G. 25, 47; 79 R. R. 307.

(*m*) *Brown* v. *Newall*, 2 M. & C. p. 570; 6 L. J. Ch. 348; *Castelli* v. *Cook*, 7 Ha. p. 94; *Dalglish* v. *Jarvie*, 2 Mac. & G. 231; 20 L. J. Ch. 475; 86 R. R. 83; *Ross* v. *Burton*, (1888) W. N. 55; *Boyce* v. *Gill*, 64 L. T. 824; (1891) W. N. p. 108; *Schmitten* v. *Faulks*, (1893) W. N. 64.

(*n*) *Att.-Gen.* v. *Corporation of Liverpool*, 1 M. & C. p. 211; 43 R. R. 176; *Castelli* v. *Cook*, 7 Ha. p. 94; *Dalglish* v. *Jarvie*, 2 Mac. & G. p. 238; 20 L. J. Ch. 475; 86 R. R. 83.

(*o*) *Dalglish* v. *Jarvie*, 2 Mac. & G. p. 241; 20 L. J. Ch. 475; 86 R. R. 83.

(*p*) *Clifton* v. *Robinson*, 16 Beav. 355; 96 R. R. 171.

A motion to discharge an *ex parte* injunction on the ground of its having been obtained by misrepresentation is proper, though the injunction is about to expire (*q*).

But even though the affidavits on which the injunction was obtained may not have stated all the facts, there may not have been such misstatement or suppression as to lead the Court to grant the injunction (*r*). The plaintiff is only bound by the facts which he states, and not by his statements of the legal consequences arising from the facts stated (*s*). He is not bound to state facts supposed to raise some point of law in reality untenable (*t*). Nor, indeed, may his ignorance of the fact, that the act of which he complained was being put a stop to at the time when he applied for the injunction, amount to such a misrepresentation as to lead the Court to hold that the injunction was improperly obtained. It is enough if the facts were stated as they were shortly before the bringing of the action, and that the plaintiff was not aware of the fact at the time of the application of any further fact requiring to be stated (*u*).

The Court does not deal with the same severity and strictness in the case of an injunction obtained on notice, as with an injunction obtained *ex parte;* but the circumstances of the case may be such as to call upon the Court to visit the plaintiff with the same severity (*x*).

Where *ex parte* injunction dissolved, applicant may again apply.

A man who has obtained an *ex parte* injunction which is afterwards dissolved on the ground of concealment of material facts, is not precluded from making an application for another injunction on the merits (*y*).

Who must move to dissolve.

If an injunction has been granted against two or more persons, each of them must move to dissolve. If only one of

(*q*) *Wimbledon Local Board* v. *Croydon Sanitary Authority*, 32 C. D. 421.

(*r*) *Brown* v. *Newall*, 2 M. & C. p. 577; 6 L. J. Ch. 350; *Castelli* v. *Cook*, 7 Ha. 89, 94.

(*s*) *Brown* v. *Newall*, 2 M. & C. p. 576; 6 L. J. Ch. p. 351.

(*t*) *Weston* v. *Arnold*, 8 Ch. 1084; 43 L. J. Ch. 123, 127.

(*u*) *Semple* v. *London and Birmingham Railway Co.*, 1 Ra. Ca. 493.

(*x*) *Maclaren* v. *Stainton*, 16 Beav. 290; 96 R. R. 132.

(*y*) *Fitch* v. *Rochfort*, 18 L. J. Ch. 458.

the defendants applies, the injunction will not be dissolved as against the others (*z*).

Where a stranger to the action is affected by an injunction, he may apply to have the injunction set aside (*a*).

Motion to discharge an order for irregularity.

The Court will not, on an application to discharge an order for irregularity, sustain it on the merits (*b*). Where an order has been made on motion and affidavit of service in the absence of parties, the Court will, on proper application, give the absent party leave to move to discharge (*c*). An injunction granted on affidavit will be discharged, if the plaintiff fails to appear before an examiner to be cross-examined on his affidavits (*d*). So also, where an *ex parte* injunction was granted upon the plaintiff undertaking to amend the writ by adding a party as co-plaintiff, so that an undertaking as to damages might be given on his behalf, and there was unreasonable delay in making the amendment, the injunction was dissolved (*e*).

Irregularity of injunction may be waived.

Although an injunction may have issued, irregularly, the irregularity may be waived by any act of the defendant affirming the subsistence of a regular injunction (*f*).

Acquiescence under the order.

After long acquiescence under an order for an injunction, an application for dissolving it will not be readily entertained (*g*). Where an order for an injunction had been made in a case where the Court had no jurisdiction, Lord Westbury would not discharge the injunction on the ground of the acquiescence of the defendant, but allowed it to stand, on the plaintiff entering into a certain undertaking (*h*).

(*z*) *Bramwell* v. *Halcomb*, 3 M. & C. p. 741; 45 R. R. 378.

(*a*) See *Bourhaud* v. *Bourhaud*, 12 W. R. 1024.

(*b*) *Brooks* v. *Purton*, 4 Beav. 494; *St. Victor* v. *Devereux*, 6 Beav. 584; 13 L. J. Ch. 102.

(*c*) *Mapp* v. *Elcock*, 22 L. J. Ch. 707.

(*d*) *O'Callaghan* v. *Barnad*, (1875) W. N. 37.

(*e*) *The Spanish General Agency Corporation* v. *The Spanish Corporation, Ltd.*, 63 L. T. 161; (1890) W. N. 158.

(*f*) *Travers* v. *Lord Stafford*, 2 Ves. S. 20; *Vipan* v. *Mortlock*, 2 Mer. 476.

(*g*) *Glascott* v. *Lang*, 3 M. & C. 451; *Bickford* v. *Skewes*, 4 M. & C. p. 500; 8 L. J. Ch. 188; *Jennings* v. *Brighton, &c., Sewer Board*, 4 De G. J. & S. 747 n.; *Bell* v. *Hull and Selby Railway Co.*, 1 Ra. Ca. 616.

(*h*) *Cardinall* v. *Molyneux*, 4 De G. F. & J. 117, 123.

Consent to an injunction cannot be withdrawn.

A party who has deliberately consented to a perpetual injunction cannot be permitted to withdraw his consent merely because he has subsequently discovered that he might have a good defence to the action (*i*).

SECTION 3.—EFFECT OF CERTAIN PROCEEDINGS ON INJUNCTIONS.

Abatement.

Under the former procedure an injunction was not dissolved by the abatement of the suit in which it had been granted (*k*). Under the present practice an action does not become abated by reason of the marriage or death or bankruptcy of any of the parties, if the cause of action survive or continue; but an order may be obtained that the husband, personal representative, trustee or other successor in interest of such party be made a party to the action, or be served with notice thereof (*l*).

Effect of amendment on injunction.

A plaintiff may, after obtaining an injunction, obtain an order to amend without prejudice to the injunction; and the injunction, even if not expressly saved, will be unaffected, unless the record is changed, or the equity on which the injunction was obtained is displaced or materially altered by the amendment (*m*).

Dismissal of action.

If the action is dismissed the injunction is *ipso facto* discharged (*n*). A motion or order for its dissolution is not necessary. But the dismissal of the action does not prevent the plaintiff from bringing another for the same purpose under a different state of circumstances (*o*), or upon new facts (*p*).

(*i*) *Ekins* v. *Williams*, 54 L. J. Ch. 336; 52 L. T. N. S. 39. See, as to judgments by consent, *Ainsworth* v. *Wilding*, (1896) 1 Ch. 673; 65 L. J. Ch. 432; *Wilding* v. *Sanderson*, (1897) 2 Ch. 534; 66 L. J. Ch. 684; *In re Wedges*, (1908) 98 L. T. 436.

(*k*) *Ferrand* v. *Hamer*, 4 M. & C. p. 147; 8 L. J. Ch. p. 97.

(*l*) R. S. C. Ord. XVII. r. 2.

(*m*) *Harvey* v. *Hall*, 11 Eq. 31; 23 L. T. 391.

(*n*) *Green* v. *Pulsford*, 2 Beav. 70; 50 R. R. 102.

(*o*) *Mayor of Liverpool* v. *Chorley Waterworks Co.*, 2 De G. M. & G. 852, 865; 95 R. R. 347.

(*p*) *Att.-Gen.* v. *Sheffield Gas Co.*, 3 De G. M. & G. 341; 22 L. J. Ch. 811; 98 R. R. 151.

If a motion for an injunction has been refused with costs, a second motion for the same object cannot be made until those costs have been either paid or secured by payment into Court (*q*).

SECTION 4.—CONTINUING OR GRANTING INJUNCTIONS AT THE HEARING.

An injunction which has been granted upon an interlocutory application is superseded by the judgment in the action. If it is intended that it should remain in force it must be expressly continued. Injunctions are continued after the trial of the action either provisionally or permanently. Injunctions are made perpetual at the trial for the purpose of protecting the plaintiff, when his right has been established, by putting an end to harassing and vexatious litigation, and preventing the repetition of illegal and unauthorised acts, or wherever a perpetual injunction is the appropriate remedy to give the plaintiff the complete relief to which he may have shown himself entitled (*r*). Where the plaintiff's right is of limited duration, as in the case of copyright, the injunction should not be in form perpetual, but until the expiration of the plaintiff's right (*s*).

An injunction will be granted on judgment in the action when it is necessary for the purposes of complete justice (*t*), although it is not claimed in the writ of summons (*u*).

As a general rule an injunction is only made perpetual at

(*q*) *Oldfield* v. *Cobbett*, 12 Beav. 91; 85 R. R. 28; *Burdell* v. *Hay*, 33 Beav. 189. As to staying proceedings until costs of former proceedings for a similar object have been paid, see *Martin* v. *Earl Beauchamp*, 25 C. D. 12; 53 L. J. Ch. 1150; *M'Cabe* v. *Bank of Ireland*, 14 A. C. 413; 59 L. J. P. C. 18; and see also R. S. C. Ord. XXVI. r. 4; *In re Wickham*, 35 C. D. 272; 56 L. J. Ch. 748; *Graham* v. *Sutton, Carden & Co.*, (1897) 2 Ch. 367; 66 L. J. Ch. 666.

(*r*) See *ante*, p. 32.

(*s*) *Sarory* v. *Gyptican Oil Co.*, (1904) 48 S. J. 573.

(*t*) *Dickinson* v. *Grand Junction Canal Co.*, 15 Beav. 271; 92 R. R. 410.

(*u*) *Reynell* v. *Sprye*, 1 De G. M. & G. 660; 21 L. J. Ch. 633; 91 R. R. 228; *Blomfield* v. *Eyre*, 8 Beav. 250; 14 L. J. Ch. 260; 68 R. R. 87. See R. S. C. Ord. L. r. 12.

judgment in the action (*x*). But an injunction may by consent be made perpetual on motion (*y*).

Declaration of right instead of injunction.

Where the inconvenience to the defendant from granting an injunction will be very serious, the Court will in a proper case, where an immediate injunction is not essential for the plaintiff's protection, merely make a declaration of the plaintiff's right to relief, and give the defendant a reasonable time to remedy the wrong complained of, with liberty to the plaintiff to apply at the expiration of the time for an injunction if his rights are then being infringed (*z*). In the case of actions to restrain nuisances by public authorities this course is frequently adopted by the Court owing to the inconvenience to the public which would arise from an immediate injunction (*a*). So also where the defendant gives an undertaking and there is no probability that the wrongful act will be repeated, the Court will often make a declaration of the plaintiff's right, with liberty to apply for an injunction if required (*b*).

As a rule no injunction where mischief ceased before trial.

If the nuisance sought to be restrained has ceased before the trial of the action, the Court will not as a rule grant an injunction (*c*).

Suspension of injunction.

When an injunction has been granted, the Court will in a

(*x*) *Day* v. *Snee*, 3 V. & B. 171.

(*y*) *Morell* v. *Pearson*, 12 Beav. 284.

(*z*) See *Islington Vestry* v. *Hornsey Urban Council*, (1900) 1 Ch. 695, 707; *Smith* v. *Baxter*, (1900) 2 Ch. 138; 69 L. J. Ch. p. 442.

(*a*) Ib.

(*b*) See *Smith* v. *Baxter*, (1900) 2 Ch. 138, 148; 69 L. J. Ch. p. 442; *Wilcox* v. *Steel*, (1904) 1 Ch. 221, 225; 73 L. J. Ch. 220; *Briggs* v. *Thornton*, (1904) 1 Ch. 386, 394; 73 L. J. Ch. 306; *Att.-Gen.* v. *Birmingham, Tame, &c. Drainage Board*, (1910) 1 Ch. pp. 60, 62; 79 L. J. Ch. p. 144; *Hanbury* v. *Llanfrechfa Urban Council*, (1911) 75 J. P. p. 308; see also *Llandudno Urban Council* v. *Wood*, (1899) 2 Ch. 705; 68 L. J. Ch. p. 625; *Bedford* v. *Leeds Corporation*, (1913) 77 J. P. 430, 434; and *Behrens* v. *Richards*, (1905) 2 Ch. p. 622; 74 L. J. Ch. 615, where the Court made a declaration of the plaintiff's right and gave in the latter case nominal damages, the matter complained of being trivial.

(*c*) *Dunning* v. *Grosvenor Dairies Co.*, (1900) W. N. 265; *Carr & Co.* v. *Bath Gas Co.*, ib. 265, n.; *Att.-Gen.* v. *Squire*, (1906) 5 L. G. R. 99; *Robinson* v. *London General Omnibus Co.* (1910), 28 T. L. R. 233. Cf. *Dean of Chester* v. *Smedley Corporation*, (1901) W. N. 179; 85 L. T. 67.

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proper case suspend its operation so as to enable the defendant to remove the cause of the plaintiff's complaint (*d*). So also the Court will suspend an injunction pending an appeal (*e*), and where the defendant is about to apply to Parliament for power to do the act complained of (*f*).

When the Court of Appeal has granted an injunction, and has suspended its operation, an application for a further suspension can be made to the judge of the Court to which the action was attached (*g*).

Discharge of injunction by Court of Appeal, undertaking substituted.

The Court of Appeal has jurisdiction to discharge an injunction which has been granted to restrain a public body from committing a breach of a public statute, and can accept in lieu thereof, its undertaking not to commit any further breach of its statutory duties (*gg*).

SECTION 5.—INQUIRY AS TO DAMAGES WHERE INJUNCTION DISSOLVED.

Though an interlocutory injunction has been granted on the undertaking of the plaintiff as to damages, the Court is not

(*d*) See *Colwell* v. *St. Pancras Borough Council*, (1904) 1 Ch. 707, 713; 73 L. J. Ch. p. 279; *Price's Patent Candle Co.* v. *London County Council*, (1908) 2 Ch. p. 544; 78 L. J. Ch. p. 8 (public welfare); *Att.-Gen.* v. *Gibb*, (1909) 2 Ch. p. 279; 78 L. J. Ch. p. 528; *Att.-Gen.* v. *Birmingham, Tame, &c. Drainage Board*, (1910) 1 Ch. pp. 60, 62; 79 L. J. Ch. 137; (1912) A. C. 788; 82 L. J. Ch. 45; *Stancomb* v. *Trowbridge Urban Council*, (1910) 2 Ch. p. 191; 79 L. J. Ch. p. 519; *Att.-Gen.* v. *Lewes Corporation*, (1911) 2 Ch. p. 509; 105 L. T. p. 701; *Yeatman* v. *Homberger & Co.*, (1912) 107 L. T. p. 46, 742 (on appeal injunction discharged by consent).

(*e*) *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 2 Ch. 388; 64 L. J. Ch. 736; *Schweder* v. *Worthing Gas Light and Coke Co.*, (1912) 81 L. J. Ch. p. 105.

(*f*) *Roberts* v. *Gwyrfrai District Council*, (1899) 2 Ch. p. 615; *Att.-Gen.* v. *South Staffordshire Waterworks Co.*, (1909) 25 T. L. R. 408 (applications to Parliament); *Bideford Urban Council* v. *Bideford Westward Ho! Railway Co.*, (1904) 68 J. P. 123, 125 (application to Light Railway Commissioners).

(*g*) *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 2 Ch. 388; 64 L. J. Ch. 736.

(*gg*) *Att.-Gen.* v. *Birmingham, Tame, &c. Drainage Board*, note (*d*), *supra*.

bound to grant an inquiry as to damages in every case in which the injunction is dissolved, or the action is dismissed at the trial. The Court has a discretion, and before it will grant an inquiry as to damages it must be satisfied that the injunction was improperly obtained and that under all the circumstances of the case damages ought to be given. It may happen that an interlocutory injunction is dissolved for delay, or for some cause which disentitles the plaintiff to an interlocutory injunction, though not to relief by way of injunction at the trial. The Court in such a case has a discretion whether under all the circumstances the defendant ought to have damages in respect of the interlocutory injunction having been granted. Moreover, the Court will have regard to the amount of damage; if it be trifling or remote, the Court will not direct an inquiry as to damages (*h*).

Application for inquiry—when to be made.

The application for an inquiry as to damages should as a general rule be made either at the time the injunction is dissolved or at the hearing of the cause. But it may be made by motion subsequently to the trial. There is, in fact, no absolute rule as to the time within which the application should be made; but, as a general rule, the Court ought to be asked to enforce the undertaking within a reasonable time after it is ascertained that the injunction has been improperly granted (*i*). Thus an inquiry has been directed after four months (*k*), and special circumstances might induce the Court to allow even a greater delay; but a special case must be made out (*l*).

Division to which application should be made.

Where an interlocutory injunction had been granted by the Probate Division on the usual undertaking as to damages, it was held that an application to enforce the undertaking

(*h*) *Smith* v. *Day*, 21 C. D. 421; 48 L. T. 54; *Ex parte Hall*, 23 C. D. p. 652; 52 L. J. Ch. p. 911; and see *Robinson* v. *London General Omnibus Co.*, (1910) 26 T. L. R. 233.

(*i*) *Smith* v. *Day*, 21 C. D. 421; 48 L. T. 54; *Ex parte Hall*, 23 C. D. p. 652; 52 L. J. Ch. p. 911; *In re Hailstone*, (1910) 102 L. T. 877.

(*k*) *Newby* v. *Harrison*, 3 De G. F. & J. 287; 30 L. J. Ch. 863.

(*l*) *Smith* v. *Day*, 21 C. D. 421; 48 L. T. 54.

should be made to that Division, and not to the Chancery or King's Bench Division (*m*).

Damages recoverable.

The damages must be confined to the loss which is the natural consequence of the injunction under the circumstances of which the party obtaining the injunction has notice at the time when he makes his application (*n*).

Defendant entitled to damages though injunction wrongly granted

The defendant is entitled to the benefit of the undertaking as to damages even though it should be decided that the injunction was wrongly granted owing to the mistake of the Court itself (*o*). Where an injunction has been wrongly granted, an undertaking given by the plaintiff is equally enforceable whether the mistake was in point of law or in point of fact. In such a case the Court will not as a rule refuse an inquiry as to damages, unless the damages alleged would be too remote, if the defendant was suing in respect of them upon a breach of contract (*p*).

Inquiry not granted where Court satisfied as to amount.

The Court will not grant an inquiry as to damages where it can satisfy itself without such inquiry as to what is the amount of such damages (*q*).

SECTION 6.—CONSEQUENCES OF THE BREACH OF AN INJUNCTION OR RESTRAINING ORDER.

Breach of injunction.

An order for an injunction must be implicitly observed, and every diligence must be exercised to obey it to the letter (*r*). However erroneously or irregularly obtained, the order must be implicitly observed so long as it exists. A party affected by it cannot disregard it or treat it as a nullity, but must have

(*m*) *In re Hailstone*, (1910) 102 L. T. 877.

(*n*) *Smith* v. *Day*, *supra*; *Schlesinger* v. *Bedford*, (1893) W. N. 57; 9 T. L. R. 378; see *In re Pemberton and Cooper*, (1913) 107 L. T. 716.

(*o*) *Griffith* v. *Blake*, 27 C. D. 474; 53 L. J. Ch. 965; *Hunt* v. *Hunt*, 54 L. J. Ch. 289; *In re Hailstone*, (1910) 102 L. T. p. 880. As to the measure of damages where an inquiry is directed, see *Mansell* v. *British Linen Company Bank*, (1892) 3 Ch. 159; 61 L. J. Ch. 696; *Schlesinger* v. *Bedford*, (1893) W. N. 57; 9 T. L. R. 370; *In re Pemberton and Cooper*, *supra*.

(*p*) *Hunt* v. *Hunt*, 54 L. J. Ch. 289; (1884) W. N. 243.

(*q*) *Graham* v. *Campbell*, 7 C. D. 490, 494; 47 L. J. Ch. p. 596.

(*r*) *Harding* v. *Pingey*, 12 W. R. 684; *Spokes* v. *Banbury Board of Health*, 1 Eq. p. 48; 35 L. J. Ch. 105.

it discharged on a proper application (*s*). A man who does not obey it to the letter so long as it exists is guilty of contempt, unless there be something to mislead upon the plain reading of the order (*t*), or a pressing emergency should make it impossible to comply with the order (*u*).

Breach of undertaking.

An undertaking entered into with the Court is equivalent to, and will have the effect of an injunction so far that any infringement thereof may be made the subject of an application to the Court (*x*). But where a party had by mistake consented to a more extensive undertaking than he intended, the Court refused to enforce the part of the undertaking which had been given by mistake (*y*).

A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal (*z*), and it is usual in the notice of motion to ask for attachment or committal in the alternative (*a*). The proper method of enforcing an *undertaking* given to the Court, whether the undertaking be affirmative or negative, is committal, not attachment (*b*). The notice of motion for committal must be personally served, but service of the order in which the undertaking is embodied need not be effected (*c*).

(*s*) *Russell* v. *East Anglian Railway Co.*, 3 Mac. & G. p. 117; 20 L. J. Ch. 261; 87 R. R. 30. Cf. *Daw* v. *Eley*, 3 Eq. p. 509; 36 L. J. Ch. 485.

(*t*) *Spokes* v. *Banbury Board of Health*, 1 Eq. 48; 35 L. J. Ch. 105.

(*u*) *Adair* v. *Young*, 12 C. D. p. 21.

(*x*) *London and Birmingham Railway Co.* v. *Grand Junction Canal Co.*, 1 Ra. Ca. 241; *Milburn* v. *Newton*, (1908) 52 S. J. 317.

(*y*) *Mullins* v. *Howell*, 11 C. D. 763; 48 L. J. Ch. 679; and see *Scott* v. *Moxon*, 81 L. T. 774.

(*z*) R. S. C. Ord. XLII. r. 7.

(*a*) See *Callow* v. *Young*, 56 L. T. 147. For the difference between committal and attachment, see *In re Evans*, (1893) 1 Ch. pp. 259—263; and *D.* v. *A. & Co.*, (1900) 1 Ch. p. 488; 69 L. J. Ch. p. 384; *Taylor & Co.* v. *Plinston*, (1911) 2 Ch. 608; 105 L. T. 615.

(*b*) *D.* v. *A. & Co.*, (1900) 1 Ch. p. 489; 69 L. J. Ch. p. 384; and see *In re Launder*, (1908) 98 L. T. 554. As to the jurisdiction of the Court to compel a solicitor, who has given an undertaking as solicitor to a person not a client, to carry out his undertaking, whether it was given in the course of legal proceedings or not, see *United Mining Co.* v. *Becher*, (1910) 2 K. B. 296; 79 L. J. K. B. 1006; compromised on appeal, (1911) 1 K. B. 840; 80 L. J. K. B. 686.

(*c*) *D.* v. *A. & Co.*, (1900) 1 Ch.

No breach till notice of injunction.

The Court will not punish for breach of an injunction or interim restraining order, unless it be clear that the party alleged to be in contempt knew that the injunction had issued, or that the order had been made (*d*). He ought, strictly speaking, to be served with the order itself in the manner already pointed out (*e*). But if the matter is very pressing, the service of the order itself will be dispensed with, and service of a copy of the minutes of the order, or of a notice of its having been obtained, will be sufficient. An injunction operates from the date of the order, and not from the time of sealing. If, after service of the notice or the copy of the minutes, the party enjoined acts in opposition to the order, he is guilty of a contempt, and may be committed (*f*).

Actual service of order not in all cases essential.

Sufficient if defendant has clear notice of order.

When an injunction has been granted restraining an act, a committal may be ordered where neither the order nor the minutes of the order have been served, nor any personal notice given, but the party enjoined was in Court at the time the order was made (*g*), or received notice of the order by telegram (*h*). If, indeed, a man remains in Court until the order is about to be made, he cannot, by leaving before the order is actually pronounced, avoid its consequences (*i*). It is sufficient that a man has clear notice, however given, of the order, and knew that the plaintiff intended to enforce it: and this rule is not limited to cases in which a breach is committed before there has been time for the plaintiff to get the order drawn up and entered (*k*).

484, 487; 69 L. J. Ch. 382; *In re Launder*, (1908) 98 L. T. 554. Cf. *Halford* v. *Hardy*, 81 L. T. 721.

(*d*) *Carrow* v. *Ferrier*, 17 L. T. N. S. 536; 37 L. J. Ch. pp. 571, 573.

(*e*) *Ante*, p. 664. As to its not being necessary to serve an order for the purpose of enforcing an undertaking embodied in it, see note (*c*), *supra*.

(*f*) *M'Neill* v. *Garratt*, Cr. & Ph. 98; 10 L. J. Ch. 297; 54 R. R. 223; *Gooch* v. *Marshall*, 8 W. R. 410.

(*g*) *Anon.*, 3 Atk. 567; *Skip* v. *Harwood*, ib. 564; *Hall* v. *Trigg & Co.*, (1897) 2 Ch. 219, 222; 66 L. J. Ch. 651; and see *D.* v. *A. & Co.*, (1900) 1 Ch. p. 487; 69 L. J. Ch. 5; *In re Tuck*, (1906) 1 Ch. pp. 695, 696; 75 L. J. Ch. p. 497.

(*h*) *D.* v. *A. & Co.*, (1900) 1 Ch. p. 487; 69 L. J. Ch. p. 384.

(*i*) *Hearn* v. *Tennant*, 14 Ves. 136; 9 R. R. 253.

(*k*) *Heywood* v. *Wait*, 18 W. R. 205; *Avory* v. *Andrews*, 30 W. R.

Order to do act within limited time.

Where an order has been made directing an act to be done within a limited time, the order must be personally served before committal or attachment can be obtained, except where an order for substituted service has been made, or where in the opinion of the Court, the service has been evaded (*l*).

No committal for breach, where *bonâ fide* and reasonable belief no injunction granted.

The Court will not commit a man for breach of an injunction, if it be doubtful whether, owing to the conduct of the plaintiff, he may not have been drawn into the idea that it was not the intention of the plaintiff to enforce the injunction (*m*). Where, for example, in consequence of the order not being drawn up and served, the defendant might very fairly consider that the plaintiff did not intend to proceed at all, it was held necessary before the plaintiff could obtain a committal that he should serve the defendant with the original order (*n*). So also, a man who has acted in breach of an injunction will not be committed for contempt, where he swears that though he had received notice of it by telegram, he *bonâ fide* believed that no injunction had been granted and the circumstances show that such belief was not unreasonable (*o*). If it is sought to commit for contempt a man who after receiving such notice disregards it, the Court must decide upon the facts of the particular case whether he in fact had notice of the injunction, and it is the duty of those who ask for committal to prove this beyond reasonable doubt (*p*).

Application to commit, how obtained.

The order for committal is obtained upon motion, notice of which must be served personally upon the party committing the contempt (*q*). The terms of the notice should be that the party "may stand committed to Holloway prison for breach of

564; 51 L. J. Ch. 419; *United Telephone Co.* v. *Dale*, 25 C. D. 778; 53 L. J. Ch. 295; *D.* v. *A. & Co.*, (1900) 1 Ch. p. 487; 69 L. J. Ch. p. 384; *In re Launder*, (1908) 98 L. T. 555.

(*l*) *In re Tuck, Murch* v. *Loosemore*, (1906) 1 Ch. p. 696; 75 L. J. Ch. 497.

(*m*) *James* v. *Downes*, 18 Ves. 522; 11 R. R. 247; *United Telephone Co.* v. *Dale*, 25 C. D. 778; 53 L. J. Ch. 295.

(*n*) *James* v. *Downes*, 18 Ves. 522; 11 R. R. 247.

(*o*) *Ex parte Langley*, 13 C. D. 110; 49 L. J. Bk. 1.

(*p*) Ib.

(*q*) *Angerstein* v. *Hunt*, 6 Ves. 488; *Hope* v. *Carnegie*, 7 Eq. p. 260; *Mander* v. *Falcke*, (1891) 3 Ch. 488; *Nelson* v. *Worssam*, (1890) W. N. 216; 61 L. J. Ch. 3; *D.* v. *A. & Co.*, (1900) 1 Ch. p. 487; 69 L. J. Ch. p. 384.

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the injunction" (*r*). If the breach has been committed by a person not named in the order, the notice of motion must be that he may be committed for his contempt in knowingly assisting in the breach (*s*). The Court has undoubted jurisdiction to commit for contempt a person not included in an injunction, and not a party to the action, who, knowing of the injunction, aids and abets a defendant in committing a breach of it (*t*). There is a clear distinction, however, between a motion to commit a man for breach of an injunction on the ground that he was bound by the injunction, and a motion to commit a man on the ground that he has aided and abetted a defendant in a breach of an injunction. In the former case, the order for committal is made to enable the plaintiff to get his rights; in the latter case, the order is made because it is not for the public benefit that the course of justice should be obstructed (*u*).

If it can be satisfactorily shown that personal service of the notice of motion to commit cannot be effected, the plaintiff may, on a proper case being made out, obtain an order (*x*) for substituted or other service or for the substitution of notice for service by letter, public advertisement, or otherwise, as may seem just, and upon affidavit of such service an order for committal of the party guilty of contempt may be made (*y*).

Grounds of notice of motion for attachment.

A notice of motion for attachment must state in general terms the grounds of the application, and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used must be served with the notice of motion (*z*). Upon a motion to commit a copy of the

(*r*) 1 Set. 430.

(*s*) *Lord Wellesley* v. *Earl of Mornington*, 11 Beav. 180, 181; 83 R. R. 136; *Seaward* v. *Paterson*, (1897) 1 Ch. 545; 66 L. J. Ch. 267; *Bosch* v. *Simms Manufacturing Co.*, (1909) 25 T. L. R. 419.

(*t*) *Seaward* v. *Paterson*, (1897) 1 Ch. 545; 66 L. J. Ch. 267; and see *Bosch* v. *Simms Manufacturing Co.*, (1909) 25 T. L. R. 419.

(*u*) Ib.

(*x*) See *In re A Solicitor*, (1892) W. N. 22.

(*y*) R. S. C. Ord. LXVII. 6; *In re Luxmore*, (1888) W. N. 63.

(*z*) R. S. C. Ord. LII. 4. See *Petty* v. *Daniel*, 34 C. D. 172; 56 L. J. Ch. 192; *Hipkiss* v. *Fellows*, (1909) 101 L. T. 701; *Taylor, Plinston & Co.* v. *Plinston*, (1911) 2 Ch. 605, 608; 105 L. T.

affidavit upon which the motion is founded need not be served with the notice of motion (*a*).

Affidavits.

The affidavits, copies of which have to be served with the notice of motion, include the affidavit of service of the order granting the injunction (*b*); except in cases where service of the order is unnecessary, *e.g.*, where the defendant was in Court and personally consented to the order (*c*). The affidavits served with the notice of motion must state that the order when served was indorsed with the memorandum pointing out the consequences of neglecting to obey it which is required by R. S. C. Ord. XLI. r. 5 (*d*); unless the order is purely prohibitive (*e*).

Order XLI. r. 5. Memorandum.

In a case (*f*) where the plaintiffs moved to commit the defendants for breach of an injunction which had been granted to restrain a nuisance, and the Court by reason of the conflicting nature of the evidence ordered the motion to stand over in order to be heard with witnesses, it was held that upon the adjourned hearing the applicants could give evidence of breaches of the injunction not specified in the affidavits they had filed, notwithstanding R. S. C. Ord. LII. r. 4.

It seems that the defendant may take advantage of the objection that R. S. C. Ord. LII. r. 4 has not been complied with, even though he has answered the affidavits (*g*). But the objection may be disposed of by adjournment (*h*).

It is no objection to an application to commit that the plaintiff is moving to commit one only of several co-defendants (*i*).

615. As to service of copies of the exhibits, see *Carter* v. *Roberts*, (1903) 2 Ch. 312; 72 L. J. Ch. 655.

(*a*) *Taylor, Plinston & Co.* v. *Plinston*, note (*z*), *supra*.

(*b*) *Hall & Co.* v. *Trigg*, (1897) 2 Ch. 219; 66 L. J. Ch. 651.

(*c*) *Hall & Co.* v. *Trigg*, (1897) 2 Ch. p. 222; 66 L. J. Ch. p. 653.

(*d*) *Stockton Football Co.* v. *Gaston*, (1895) 1 Q. B. 453; 64 L. J. Q. B. 228.

(*e*) *Selous* v. *Croydon Rural Sanitary Authority*, 53 L. T. 209; *Hudson* v. *Walker*, 64 L. J. Ch. 204; *Murphy* v. *Willcocks*, (1911) 1 I. R. 402.

(*f*) *Dean of Chester* v. *Smelting Corporation*, W. N. (1902) 5.

(*g*) *Taylor* v. *Roe*, 68 L. T. 213. See *Jeffries* v. *Jeffries*, (1907) 51 S. J. 572.

(*h*) *Rendell* v. *Grundy*, (1895) 1 Q. B. 16, 20; 64 L. J. Q. B. p. 137.

(*i*) *Neuman* v. *Ring*, 10 Jur. 463,

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Proof of breach must be clear.

An order for committal is *strictissimi juris*, and cannot be sustained, unless it can be shown upon the clearest evidence that there has been an actual breach of the injunction (*k*). The general terms of an injunction will not, however, be restricted by reference to the particular injury complained of in the action, if the injunction has been in spirit violated (*l*). But the Court will not allow an injunction to be used for the purpose of oppression or vexation. It is not because a man has an injunction restraining his neighbour from causing a nuisance to him that there should be a motion to commit the defendant by reason of some trifling thing being done in the ordinary course of business, which has not caused any real mischief (*m*). In determining whether there has been a breach, however, the Court will have regard to the circumstances under which, and the objects for which, the injunction was obtained (*n*).

What constitutes breach of injunction.

An intention to violate an injunction is immaterial unless the breach be actually carried into effect (*o*). Thus, where an injunction was granted restraining a man and his servants from stopping, impeding and obstructing the passage of boats, &c., along a canal, the placing of a bar which was capable of being easily moved across the canal, and the stationing of persons at a bridge on the canal to give notice to persons passing along that they were trespassing, without however, attempting to stop them, were held not to amount to a breach (*p*).

Where an injunction was granted against a husband and wife, and a breach of the injunction was committed by the wife, who was living separate from her husband, it was held that the husband could not be committed for contempt (*q*).

(*k*) *Harding* v. *Pingey*, 12 W. R. 685; *Dawson* v. *Paver*, 5 Ha. p. 424; 16 L. J. Ch. 277; 71 R. R. 155.

(*l*) *Att.-Gen.* v. *Great Northern Railway Co.*, 4 De G. & S. 75; 87 R. R. 294.

(*m*) *Baxter* v. *Bower*, 44 L. J. Ch. p. 628.

(*n*) *Loder* v. *Arnold*, 15 Jur. p. 118. See *Russell* v. *East Anglian Railway Co.*, 3 Mac. & G. 104; 20 L. J. Ch. 261; 87 R. R. 30.

(*o*) *Grand Junction Canal Co.* v. *Dimes*, 18 L. J. Ch. 419.

(*p*) Ib.

(*q*) *Hope* v. *Carnegie*, 7 Eq. 254, 260.

If a plaintiff who has obtained an injunction misrepresents to the public what has been done by the Court, and the defendant, to correct that misrepresentation, does an act which in strictness is a breach of the injunction, the Court will not entertain any complaint against him on the part of the plaintiff for such a breach (*r*).

Whether parties not named in the order can be committed.

Persons not named in the order are not liable to be committed for breach of the injunction itself (*s*). Thus, where an injunction restrained only A. B., and did not in terms extend to "his servants and agents," the Court declined to commit an agent of A. B. *for breach of the injunction*, inasmuch as he was not expressly enjoined (*t*). The agents, however, of a man against whom an injunction has been awarded, although not named in the order, may be committed for *contempt*, if, *having knowledge of the injunction*, they act in contravention of the order of the Court (*u*). Moreover, any person, whether an agent or not, who, knowing of an injunction, aids and abets the party enjoined in committing a breach of it, is liable to be committed (*x*). In such cases the committal is not, technically, for breach of the injunction, but for a contempt of Court tending to obstruct the course of justice (*y*).

In a case where a purchaser of part of a company's business obtained an injunction restraining the company, its servants and agents from soliciting its former customers, and the company went into voluntary liquidation and transferred its undertaking to a new company of the same name which solicited the purchaser's customers, it was held that no breach of the injunction had been committed by the new company as it was an independent body and not the servant or agent

(*r*) *Barfield* v. *Nicholson*, 2 L. J. (O. S.) Ch. 90.

(*s*) *Iveson* v. *Harris*, 7 Ves. 256. See *Brydges* v. *Brydges and Wood*, (1909) P. p. 191; 78 L. J. P. p. 100.

(*t*) *Lord Wellesley* v. *Lord Mornington*, 11 Beav. 180; 83 R. R. 136.

(*u*) *Lord Wellesley* v. *Lord Mornington*, 11 Beav. 181; 83 R. R. 136; *Avory* v. *Andrews*, 51 L. J. Ch. 419; *Seaward* v. *Paterson*, (1897) 1 Ch. 545; 66 L. J. Ch. 267; and see *Bosch* v. *Simms Manufacturing Co.*, (1909) 25 T. L. R. 419. See *Scott* v. *Scott*, (1913) A. C. pp. 456—459; 82 L. J. P. pp. 93—95.

(*x*) *Seaward* v. *Paterson*, (1897) 1 Ch. 545; 66 L. J. Ch. 267. See *Scott* v. *Scott*, (1913) A. C. p. 457; 82 L. J. P. p. 94.

(*y*) *Seaward* v. *Paterson*, *supra*.

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of the old company, the reconstruction of the old company having been carried out *bonâ fide* for the purpose of obtaining fresh capital and not in order to evade the injunction (*z*).

Breach of injunction by servants or agents.

If no blame can be attached to a man personally, the Court will not commit him for contempt because his servants (*a*), or his agents (*b*), or his wife, who is living separate and apart from him (*c*), may have committed a breach of the injunction.

Sequestration.

If the party guilty of a breach of an injunction or undertaking is a company or other corporation, the proper course is to move that a writ of sequestration shall issue (*d*). A corporation such as a local authority, which can only act by its servants or agents, is liable for a breach of an injunction or undertaking though committed by its servants through carelessness, neglect, or even in dereliction of their duty (*e*).

Where a corporation has been guilty of a breach of its undertaking, but is honestly endeavouring to fulfil its obligation, the Court will order the writ of sequestration to issue but to lie in the office for a certain period, and not to issue from the office if within the time fixed the corporation carries out its undertaking (*f*).

Attachment of officer of corporation.

In addition to the remedy by sequestration, an injunction against a corporation may be enforced by attachment against

(*z*) *Bosch* v. *Simms Manufacturing Co.*, note (*u*) *supra*.

(*a*) *Rantzen* v. *Rothschild*, 14 W. R. 96; 13 L. T. 399.

(*b*) *Ex parte Langley*, 13 C. D. 121; 49 L. J. Bk. p. 6.

(*c*) *Hope* v. *Carnegie*, 7 Eq. 254.

(*d*) See *Spokes* v. *Banbury Board of Health*, 1 Eq. 42; *Selous* v. *Croydon Board of Health*, W. N. (1885) 105; *Re Hooley*, 79 L. T. 706; *Fairclough* v. *Manchester Ship Canal*, W. N. (1897) 7; *Att.-Gen.* v. *Walthamstow Urban Council*, 11 T. L. R. 533; *Meters, Ltd.* v. *Metropolitan Gas Meters, Ltd.*, (1907) 51 S. J. 499; *Milburn* v. *Newton Colliery Co.*, (1908) 52 S. J. 317 (breach of undertaking); *Stancomb* v. *Trowbridge Urban Council*, (1910) 2 Ch. 190, 194; 79 L. J. Ch. p. 520; *Davis* v. *Rhayader Granite Co.*, (1911) 131 L. T. Jo. 79. See R. S. C. Ord. XLII. r. 31; Ord. XLIII. r. 6. As to issue of writ without service of the order disobeyed where the defendant is evading service, see *Rex* v. *Wigand*, (1913) 2 K. B. 419; 82 L. J. K. B. 736.

(*e*) *Stancomb* v. *Trowbridge Urban Council*, *supra*.

(*f*) See *Att.-Gen.* v. *Walthamstow Urban Council*, 11 T. L. R. 533; *Lee* v. *Aylesbury Urban Council*, (1902) 19 T. L. R. 106; *Stancomb* v. *Trowbridge Urban Council*, (1910) 2 Ch. 197; 79 L. J. Ch. p. 521.

the directors or other officers (*g*); but in such a case the director or other officer sought to be attached must have been personally served with the order granting the injunction (*h*).

Costs.

If, upon hearing the affidavits on both sides, the Court is of opinion that the defendant is guilty of a breach of injunction, it makes an order for his committal, and he will not be discharged unless he pays the applicant's costs (*i*). But where the breach is not wilful or contemptuous, or if the defendant has endeavoured to set himself right, or expresses his regret for what he has done, and promises to obey the injunction, or if the plaintiff does not press for committal, the Court is generally satisfied by merely making him pay the costs of the application of bringing the breach under the notice of the Court (*k*). The costs may be directed to be paid as between solicitor and client so as to indemnify the plaintiff against the costs of the proceedings (*l*). Though the motion to commit may be refused, it will generally be without costs, if the party against whom it is sought or his solicitor has been to blame in the matter (*m*). But the Court will not encourage motions to commit where no real case for committal is made out, but only an apology and costs are asked for, and the party so moving ought not to be allowed his costs (*n*).

Frivolous motions to commit discouraged.

Form of order for committal.

An order for committal for breach of an injunction must

(*g*) R. S. C. Ord. XLII. r. 31.

(*h*) *McKeown* v. *Joint Stock Institute, Ltd.*, (1899) 1 Ch. 671; 68 L. J. Ch. 390.

(*i*) *Price* v. *Hutchison*, 18 W. R. 204; 9 Eq. p. 537.

(*k*) *Littler* v. *Thompson*, 2 Beav. 129; 50 R. R. 124; *Lane* v. *Sterne*, 3 Giff. 629; *Re Bryant*, 4 C. D. p. 100; 35 L. T. 489; *Plating Co.* v. *Farquharson*, 17 C. D. 49; 50 L. J. Ch. 406.

(*l*) *Lee* v. *Aylesbury Urban Council*, (1902) 19 T. L. R. 106; *Stancomb* v. *Trowbridge Urban Council*, (1910) 2 Ch. 196, 197; 79 L. J. Ch. p. 521; *Davis* v. *Rhayader Granite Quarries Co.*, (1911) 131 L. T. Jo. 79.

(*m*) *Carrow* v. *Ferrier*, 17 L. T. 536; *Daw* v. *Eley*, 7 Eq. 49.

(*n*) *Plating Co.* v. *Farquharson*, 17 C. D. 49, 56; 50 L. J. Ch. p. 408; *Metropolitan Music Hall Co.* v. *Lake*, 60 L. T. 749; and see *Reg.* v. *Payne*, (1896) 1 Q. B. p. 581; 65 L. J. Q. B. p. 428; *In re New Gold Coast Exploration Co.*, (1901) 1 Ch. p. 863; 70 L. J. Ch. p. 357; *Scott* v. *Scott*, (1912) P. p. 248; 81 L. J. P. p. 117; reversed on appeal on other grounds, (1913) A. C. 417; 82 L. J. P. 74.

recite the affidavit of service of the order granting the injunction, and either the affidavit of service of the notice of motion, or the appearance of the defendant personally, or by counsel, upon the motion (*o*). The order ought in strictness to be prefaced by a declaration that the act complained of is a contempt, but the absence of such a declaration is not a ground for discharging the order for irregularity (*p*). It is not irregular to engraft upon the order a direction that the party committed shall pay the costs of his contempt, but, if the order extends to charges and expenses as well as costs, it is to that extent irregular (*q*).

Court may direct performance of judgment by another person at the cost of the disobedient party.

If a mandatory order or injunction be not complied with, the Court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained or by some other person appointed by the Court or a judge, at the cost of the disobedient party, and upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a judge may direct, and execution may issue for the amount so ascertained and costs (*r*).

An appeal—when it lies.

An order to commit may be appealed from without leave, the liberty of the subject being involved (*s*); but an order *refusing* an application to commit cannot, since the Judicature Act, 1894, came into force, be appealed from without the leave of the judge (*t*).

(*o*) *Stephens* v. *Workman*, 8 L. T. 232; 11 W. R. 503.

(*p*) *Ex parte Van Sandau*, 1 Ph. 605; 15 L. J. Bk. 13.

(*q*) Ib.

(*r*) R. S. C. Ord. XLII. 30. See *Mortimer* v. *Wilson*, 33 W. R. 927; and the Judicature Act, 1884, s. 14.

(*s*) See sub-s. (1) (b) (i) of s. 1 of the Judicature Act, 1894.

(*t*) *Bowden* v. *Foxall*, (1901) 1 Ch. 1; 70 L. J. Ch. 5.

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THE END.

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